Supreme Court, U.S.
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No. 96-8400

In The

Supreme Court of the United States

October Term, 1996

DOUGLAS MACARTHUR BUCHANAN, JR.,

Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT APPENDIX

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CHRONOLOGY OF RELEVANT EVENTS

April 28, 1988	Petitioner convicted of one count of capital murder and three counts of first degree murder in the Circuit Court of Amherst County, Virginia
April 30, 1988	The jury fixes the sentence at death
August 19, 1988	Trial judge imposes death sentence fixed by the jury
September 22, 1989	Petitioner's convictions and death sentence affirmed by the Virginia Supreme Court on direct appeal
January 22, 1990	United States Supreme Court denies certiorari. *Buchanan v. Virginia*, 493 U.S. 1063 (1990)
December 19, 1991	State habeas corpus petition dismissed by the Circuit Court of Amherst County
June 25, 1992	Virginia Supreme Court denies the petition for appeal
November 16, 1992	United States Supreme Court denies certiorari. *Buchanan v. Murray*, 506 U.S. 988 (1992)
April 15, 1993	Petition for writ of habeas corpus filed in the United States District Court for the Western District of Virginia
January 25, 1996	District Court denies habeas relief, *Buchanan v. Murray*, C.A. No. 93-0306-R (W.D. Va. 1996)
April 8, 1996	District Court denies motion for reconsideration

December 30, 1996	United States Court of Appeals for the Fourth Circuit affirms denial of habeas relief, *Buchanan v. Angelone*, 103 F.3rd 344 (4th Cir. 1996)
January 27, 1997	Court of appeals denies rehearing
April 28, 1997	United States Supreme Court grants certiorari, *Buchanan v. Angelone*, 117 S.Ct. 1551 (1997)

VIRGINIA:

IN THE CIRCUIT COURT FOR
THE COUNTY OF AMHERST

Commonwealth, Plaintiff

v.

Douglas McArthur Buchanan, Jr.
Defendant

* * *

[809] Doss: Is there anything that happened recently that lead up to it? I mean was it something that had just happened or had it just been building up?

Buchanan: It's been building up since I was – since my real mother died, I mean.

* * *

[881] Doss: Was it your plan to kill all them when you went there?

Buchanan: No, not really. I was – Geraldine, I just – I mean she's burnt pictures of my real mother in front of me and cut them up and threw them away.

Doss: All right.

Buchanan: That's why she was responsible the way everything happened. I mean everything was going good when we first got married but then – I don't know we – it was like, you know, we had our good times – sometimes me and her got along great but then it would always just something would just come up. Like I would just ask to go see my mom's grave, I mean I would let them know I was going so they wouldn't come up and down the road and see me down there and get mad, and then most of the time they wouldn't let me do it. They

just told me that wasn't – I don't know – she just said well I'm your mother now and they s – she said that she was never any kind of mother to you, I mean I wasn't old enough to know her, but still, I mean everybody else told me [882] she was a good mother, you know, but – and now the only picture I have left that I could ever get is just a – a newspaper clipping about how my dad got married. I mean, there were paintings in the house that she burnt and she burnt all the pictures in the – even Chris when uh, we – right after we got married we was sitting in the dining room and they were showing pictures she got out the album – and uhm she was going through them and one of the pictures just had me when I was real little standing beside my mom and the only thing that had her was from the waist down, just her legs. And right there she took and – took a lighter and burned it up. She said I'm not finished with it. And that's been going on ever since I can remember, you know.

* * *

[915] Q So his granddaddy lived on one side and his uncle and aunt lived on the other side and they were the – his mother's relatives?

A That's correct. Yes, sir.

* * *

[919] Q Now, when you went there the fences around the – how many "no trespassing" signs were on those fences, do you know?

A there was one on the gate. There is at least –

* * *

[919] Q Is that the gate between Peggy Bolen, his mother's sister, and that's the side Peggy Bolen, his mother's sister, lived?

A It is the side that Peggy Bolen lives on,

* * *

[919] A And there's one on the front facing the road. Those are the only two that stick in my mind.

[920] Q Okay. And do you remember going to the – it use [sic] to be a gate in there, I believe. Do you remember that gate that's been wired up between his grandfather's house and his house?

A I have heard about it. I never actually examined it. I didn't walk the fence line.

* * *

[923] A Yes, sir. That shows a "no trespassing" sign on the fence.

Q On the grandfather's –

A Facing towards the grandfather.

* * *

[1016] Q How many of your mother's relatives lived around here out there at your house?

A Her sister and brother and parents.

Q Now do you – we know that your mother died when you were what age?

A Nine.

Q And how long had she been sick?

A About three or four years.

Q Do you remember much about that?

A No.

Q Prior to her death, did you have much contact with your mother's family, your aunts and uncles and your grandfather?

A I mostly stayed with them instead of at home.

Q Did both of your parents work when your mother wasn't sick?

[1017] A Yes.

Q Who took care of you when they were working?

A My grandparents.

Q Where did they live in relation to your house?

A Next door.

Q Was it both your grandfather and your grandmother or just one of them?

A Both.

Q Did y'all spend a lot of time with your relatives on holidays and things like that?

A Yeah. On Christmas we usually went to everybody's house.

Q Was it a pretty close family –

A Yeah.

Q – relationship? Did everybody get along okay most of the time?

A Yeah.

Q Now when – do your aunt and uncle have any children? Do they have any –

A Two kids.

Q Are they fairly close in age to you?

A One's 17 and one's 14, I think.

Q Did you play with them when you were little?

A Yeah.

Q Did you have other friends in the area that [1018] you played with?

A Yeah.

Q Now, how was it that your stepmother, Geraldine, came to the area?

A Well, she was my real mother's first cousin. And they came down to visit a lot before that – before she died. And she used to help my dad with things sometimes while my mother was in the hospital.

Q Did she help with things around the house?

A Yeah.

Q And after your mother died, she and your father got married?

A Right. About – within six months later.

Q And at first was there any problem with any of your mother's family?

A No, not for about the first year. Everything went on just like it did before except for on holidays we didn't go around to the houses no more.

Q And what happened that caused things to change?

A I don't know how it started. I just know that one day my parents came into my room and told me that I couldn't speak to them any more.

Q Do you – you don't know what the argument – do you have any idea what the argument was about?

[1019] A It was just that my grandfather and my dad were at the fence and they both just didn't hear each other yell at each other or something like that. I really don't know how it happened. They just decided we couldn't talk anymore.

Q And how old were you at that time?

A Ten, may be eleven.

Q Well, did you play outside in the yard and everything?

A Yeah.

Q Didn't you – did you see your grandfather and your aunts and uncles out there?

A Yeah, but I couldn't wave at them or talk to them though.

Q What would happen if you did?

A Got grounded.

Q What do you mean by grounded?

A Have to go to my room. I wouldn't be able to go back outside.

Q How long would you have to stay?

A Usually all day or all night depending on what time it was.

Q Well, I mean, did – you had a pretty good size yard, didn't you? Weren't you able to see them out there?

[1020] A I had two acres. Yeah, I could see them all the time cause they just lived just right next door to us, maybe fifty yards or so, maybe a hundred – no, about fifty yards.

Q Well, how would your parents know whether or not you waved at them or looked at them?

A They would see me out the window or something. They usually watched and make sure I didn't speak to them.

Q Would your aunts and uncles and grandparents try to speak to you?

A At first they did because they didn't know that I wasn't supposed to speak to them. But after a while my parents and them got in an argument at the fence and they told them I couldn't speak to them anymore. And then they wouldn't try because they didn't know if my parents was looking or not. They just waited for me to wave if I had a chance.

Q Were there occasions where your parents did see you wave, say at your uncle, for example?

A Yeah. Then they'd take me back into the house and wouldn't let me go back outside – sometimes all weekend. I never could to outside the fence.

Q Besides putting you in your room, did they – were there other punishments that they imposed on you?

A Yeah, they used to whip me until I was about [1021] sixteen or seventeen. They'd take me in my room and pull down my pants and hit me with a belt or a fly swatter.

Q When you say a fly swatter, how do you mean?

A They used the metal end instead of the plastic.

Q Did they make you do chores and things like that?

A Yeah, I did most of it. I had to cut the grass and do the garden and make sure the buildings are clean, get the wood.

Q Why did your father and your stepmother not want you to have any contact with your relatives? I mean what –

A They just didn't want – they just didn't want me to think about my mom, I don't guess.

Q Did they tell you that?

A Well, they didn't just come out and tell me, but they did lots of things that, you know, showed it.

* * *

[1022] A Well, besides not letting me speak to my mother's people, they took all the furniture that was hers

out of the house and replaced it and they burnt pictures of her.

Q When your mother died, did you get anything that was hers?

A Just a – well I have – there was a lot of pictures in the house right after she first died, but – and then I got her rings.

Q But where did you keep them?

A I used to keep them in my room and I then I slept with them at night.

Q And what happened to them?

A They took them away from me after I couldn't talk to my grandparents anymore.

Q And you say they destroyed the photos. Did you manage to save any photos?

A Yeah, I saved one up until the time that me and Chris got married and had to move out and then I don't know what happened to that one. It used to be up under my [1023] mattress cause that's where I used to keep it cause they wouldn't find it under there and –

Q Did they know you had it?

A No.

Q Did you just keep it under there all the time or –

A No, I took it out whenever like they weren't home or at night and I could look at it then, but I didn't want them to walk in and catch me looking at it.

Q Did they say things to you about your mother as to why they didn't want you to – why didn't they want you to remember your mom?

A I don't know why, they just didn't. I mean, they just decided – I don't know what was in their minds, I can't say. They said that she cheated on my dad all the time.

Q Well who's – I mean who's idea was it to get rid of everything of your mother's? Was it your father's idea or was it Geraldine's idea?

A Geraldine.

Q Now why – did she say anything that would give you any reason why she wanted to do that?

A She said she didn't want anything of hers in the house.

* * *

[1025] Q Where was your mother buried?

A Right down the road from our house about a mile.

Q Did you go to the funeral?

A Yes.

Q How far down the road from your house was it?

A About a mile, half a mile maybe.

Q After she was buried, did you go visit her grave?

A I did a couple of times, but I wasn't allowed to do that.

Q Why weren't you allowed to do that?

A They just told me I couldn't go. If I'd ask, they tell me not to.

Q Did you try to go anyway?

A I went a couple of times.

Q Did they find out about it?

A Well one time they did, one time they didn't.

Q Well, what happened when they found out about it?

A They just told me I couldn't go back out the [1026] yard for I think it was a week or something like that.

Q You had the fence around the yard at that time?

A Right. Every since I can remember.

Q When did the posted signs go up?

A Some time after they stopped talking. They'd got into an argument at the fence, and so they put up posted signs so that way – make sure nobody come in.

Q Well, you got on the school bus right there at your house, didn't you?

A Right.

Q How did you get on the school – how were you able to – did your cousins go to school with you as well?

A Yeah, they – like they lived right beside us and they went to the end of their yard and I had to stay at our

mailbox though until the bus came. After they got on, then I could walk up there and get on the bus.

Q Did the bus make two stops or did it just stop at one place?

A No, just one. We both had to get on at the same time.

Q What about after you got on the bus? You could see them after you got on the bus, couldn't you?

A Yeah, but I couldn't talk to them. I wasn't suppose to. Sometimes I would, but if somebody said [1027] something I'd get in trouble.

Q Did you have friends come over to the house and visit you and things like that? You still had other friends besides your relatives, didn't you?

A Yeah, but not usually – usually nobody came to the house though. I usually didn't ask anybody up there because if I did, they wouldn't let me. I think one person came when I was in Junior High.

Q Okay. On holidays and things like that you weren't allowed to see any of your relatives then either?

A No, we just stayed home or went to West Virginia.

Q In the past at holidays what kind of things had y'all done together, say Christmas time and things like that?

A In the past? We had – well before my mother died – well really right after she died, too – we'd go around to everybody's house, my grandparents, my aunts and

uncles, and then we'd end up back at my house. But – and then after I couldn't talk to them, we just stayed at home or went to West Virginia.

Q Did your relatives try to give you presents on your birthday and Christmas and things like that?

A Yeah, they used to send them to me, and then my parents would send them back.

[1028] Q Did you get to open them?

A No. They'd just look at the tag and see who they were from.

Q Did they send them to you in the mail or what?

A No, sometimes they would send somebody to give them to me at church or I would get them in the mail. Well, they sent one for everybody, but nobody kept them.

Q They sent presents for your stepbrothers, too?

A Yeah.

Q And they were all sent back?

A Uh-huh.

Q Did you go Christmas caroling and things like that with your relatives?

A As long as my cousins weren't going I was – I could go, but if they were going my parents wouldn't let me go.

Q Is this when you were with your church group, is that when?

A Right.

Q You did – you were allowed to go to church and things like that on Sundays?

A Yeah. I went to – well I had to go to church. And then I could go on the functions like the youth group would have as long as my cousins didn't go, too.

Q And they weren't worried about you seeing your [1029] relatives or anything at church?

A No, cause they didn't go.

Q Did they question you about whether or not you had seen anybody or talked to anybody?

A Yes. Sometimes they would ask me if anybody asked about them, you know, like if anybody said they said hi or something like that.

Q And what if they had?

A Well, if they had I'd probably get sent back to my room again – if they ever heard of it. I always told them no.

* * *

[1030] Q And they would – when – I mean as long as you didn't try to talk to your relatives and everything it was okay, wasn't it?

A Right. I could stay out in my yard as long as I didn't talk to anybody.

* * *

[1032] Q Doug, take a look at this photograph. Is that photo – is that the same photo you had that you hid under your mattress?

A No, it's just like it, but it's the same one, I mean, it's not the same one.

Q Where did you get that one from?

A Audrey gave it to my aunt.

Q When did she give it to you?

A Right after I'd moved out.

Q After you moved out of your parents' house?

A Uh-huh.

Q Is that when you lost the one that you kept under the mattress?

A Yeah, within the two weeks before I moved out.

* * *

[1033] Q Well, Doug living out there did you – were there a lot of confrontations with your relatives – between your parents and your relatives?

A Yeah. They used to argue at the fence all the [1034] time.

Q Who would argue?

A My grandfather and my mother's brother and sister. They'd argue with my parents.

Q Well, what were the – how did the – what would the arguments usually be about?

A Well usually it'd start over nothing.

Q Were you there?

A Somebody would just –

Q Were you out there in the yard when it happened?

A Yeah. Usually somebody would just yell something to somebody over the fence just to make them mad. And then they'd all just pile up around the fence, like on each side of it, and they would argue. And usually they'd tell each other they'd go out into the road and they'd settle it out there cause they didn't want to get on each other's property. And –

Q What would happen if they did that?

A They'd end up in court.

Q Did they do that?

A They went – they took warrants out for each other a couple of times. I don't know whatever happened to anybody but – I don't – they usually pulled guns out on each other or something. Nobody ever shot anything, but they [1035] usually had guns out there.

Q Was it just generally a lot of yelling then, is that what it was?

A Yeah, they'd yell and threaten to kill each other and blow each other's houses up, stuff like that. Usually they would be arguing and me and my Aunt Audrey would just walk on down the fence a little ways and talk cause they wouldn't be worried about me talking to her then because they were too busy arguing.

Q Were there some arguments with your uncle that your father had with your uncle right there at the fence?

A Yeah.

Q What were they about?

A They'd argue. Just threaten to kill each other.

Q How did they get started? Would one be out in the yard working or something?

A Yeah. Well usually the whole family would end up out there on both sides. I really don't know how they started all the time. They just ended up – usually I'd just be playing or something and turn around and they're all over there at the fence arguing or something. Sometimes it'd be because of my uncle, he'd be cutting the grass too close to our fence. And my dad would say he'd seen the fence shake or something like that and that would start an argument. Or my [1036] uncle planted some pine trees a little ways from the fence, and my dad got mad and said they might grow through the fence, so that start another argument.

* * *

[1040] Q Did you try to stand up to your father and your stepmother?

A No, I couldn't do that because then I'd get sent back to my room again.

Q You never tried to stand up to them and get what you wanted?

[1041] A When I turned about eighteen or so, I'd stand up to them. Then me and my dad would get into a fight.

Q What would happen?

A He usually hit me. He didn't do that when I was young though. He just beat me with a belt, but then I got older he hit me.

Q And you didn't fight him back?

A No. I just kind of kept running across the floor or something.

Q Would Geraldine come out and stop y'all from fighting?

A Yeah. One time she come out with the pistol and told us to quit even though we weren't really fighting. He was just hitting me. I was just laying there.

Q Well, when they sent to your room, didn't you – did you try to come back out of your room?

A Yeah. They usually sat on the – where the love seat is at – they usually sat there and made sure I didn't come out my room.

Q What happened if you came out?

A I never came out. I don't know what would have happened. He'd probably whip me again or something. I got out once though. I jumped through the window.

* * *

[1042] Q And you say you – how did you get along with Geraldine?

A We got along – well sometimes we got along great and then sometimes we didn't. I mean, sometimes we didn't get along at all.

Q You said that she burned your photo – she got rid of photographs and burned some stuff that belonged to your mother. And what were the circumstances that that – when that happened? How did you find out about it? How were you aware of it?

A Like I guess she had burned some before because all the pictures in the house were gone, but –

* * *

[1042] A And then one day I come into the kitchen and she was burning all the ones out of the photo albums.

Q She was burning them in the kitchen?

A In the sink. And she just told me to come and look, and when I went over there she was sitting there [1043] burning all my mom's pictures.

Q Is that when you got that one and hid it or had you already done that?

A No, I'd already got that one. All of them were taken out of the house. They had left one in my room. So I just took that one and hid it cause – after I seen her burning all of those.

* * *

[1045] Q When he was talking to you about his suspicions about Geraldine, did he ever talk about your mother?

A Yeah. He usually said she did the same thing. They've said that since I was little.

* * *

[1055] Q Did you talk to them anymore after that?

A No, well I called my dad while I was at Audrey's and told him where I was and I told him I'd see him as soon as I could start moving around, which just took about two or three days. And – but then I went over to B.G. Market and I was going in and dad's car was there and I passed him in the door but he wouldn't – he didn't say – I said hi to him but he didn't say anything to me, so he just walked on out and got in his car and left.

Q And this was – when did this happen?

A About a week after my operation.

* * *

[1055] Q Did you see your father and your – or your stepmother on the road or anything like that any other time?

[1056] A Yeah, I seen them a couple of times on the road and like if they were by theirself they'd wave at me, but if they were together they wouldn't wave.

[1067] Q How was the conversation going with your father?

A It was okay at first for about the first few minutes. We went back into the house and he gave me something to drink. And we were just sitting there just talking. And he asked me how me and Chris were doing. And I said fine. And then I told him I got another job and

I told him where we'd moved to cause he didn't know where I was living. And then when I asked him how he was doing, he said it was just the same old thing and he started bringing up saying that Geraldine was cheating on him again. I think he knew about the post office box then, I'm not for sure.

Q What did you tell him?

A Well, at first I didn't say anything because I didn't want to get into it again, but then I told him well – cause he acted like he – it was really bothering him, you [1068] know – so I told him to just divorce her, but he said he didn't want to get rid of the kids. And then he said it would have been the same way if my mother – if my real mother was alive.

Q Now what was the tone of this conversation that you were having?

A Well, he was yelling at me then cause, I don't know we – he was getting pretty mad at me.

Q Why?

A I guess cause I just didn't agree with him. I just didn't agree with him.

Q Well, when he mentioned your mother, did you say anything back to him?

A Yeah, I just told him that she weren't really that way. I didn't understand why he said that and then –

Q Now how did you feel when he said that?

A I was getting mad. I was sweating. I was getting real hot and I was shaking.

Q Did you try to talk to him about that topic?

A Yeah. And he just stood up and said that's it, let's go out and look at this car I bought for J.J. And it's like he got out of one argument and he started another. Cause, I mean, J.J. was just thirteen and already buying him a car and they didn't buy me one. You know, it's just the way – it didn't really start an argument. It just hurt, you [1069] know, cause they didn't even let me have my driver's license until I was eighteen. I didn't understand why all of a sudden they get him a car and he's not even old enough to have a driver's license yet. They didn't need another car. They had two that run.

Q And then what happened?

A Then he started to walk out the door and I shot him.

Q Why did you do it?

A I don't know. I was just mad. I just was – I don't know really why I did it. I didn't mean to. It just happened.

* * *

[1245] THE COURT: Members of the Jury, give me your attention a minute. We are now beginning the – what we will call the second phase or the phase in which the penalty for capital murder will be determined by you. As I told you in your *voir dire*, the only options are a life sentence or a death sentence. So, that will be what we are dealing with in this hearing.

And then you will be given written instructions and a written verdict form just like you were in the prior

phase. And then you will – after the attorneys make their opening statements and present evidence and argue the matter and the court reads you the instructions, then you retire to your room and deliberate on what the penalty should be in the capital murder case.

Now, it's been agreed and stipulated by the Commonwealth Attorney and by the defendant and his attorneys, that all of the evidence you have heard on the guilt or innocence [1246] phase – which was completed yesterday, all of that evidence – including the testimony of witnesses and all exhibits – all the pictures and all the exhibits that you took with you to your jury room – all those are agreed to be evidence at this second stage hearing. All of that is still evidence in the case. That's agreed.

There will be testimony of witnesses and probably other exhibits offered in this trial – in this part of the trial. So with that then, Mr. Meeks, you – do you want to – are any witnesses to be separated – called and separated?

* * *

[1249] MR. MEEKS: Thank you, Judge. Ladies and gentlemen of the jury, as the court has already advised you, you are able to consider all of the evidence that you've heard since you first came into this courtroom several days ago. That primarily will be the evidence that the Commonwealth is presenting you to meet the second burden of proof which the Commonwealth has and that is primarily to demonstrate to you that the defendant – what he did was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity or

aggravated battery. The court will give you the instruction on that at the appropriate time.

We will recall to you when we make our [1250] closing arguments, as we recall to you now, the rather specific evidence that was given to your during the trial. You will recall the testimony of Dr. Massello, I will refer to it several times. You will recall the testimony of Officers Doss and Viar and the statements that were made, and how they matched up against the defendant when he testified yesterday. You can consider all of that. And apparently you have resolved some of the conflict by the verdict that you brought in last night.

Now there will be additional evidence today, probably by both sides. But I suggest to you that it will basically be nothing new under the sun. You have already heard how the crimes occurred. How horrible they were. How violent they were. And how each victim received more than was necessary merely to kill them – which is pretty much the standard under the law.

You also have heard – and I think I conceded it, too, in my closing argument last night – that Douglas Buchanan had a troubled childhood. He had parents that quarrelled [1251]. He had parents that did not let him deal with his grandparents. He had a number of problems of growing up. You will hear more of that today. You will probably hear it from his grandfather, his Aunt Audrey, whose name you've heard several times. You will hear it from Reverend Campbell of the Cornerstone Baptist Church. And you've heard his name many times. And you will near it from people who lived in that neighborhood.

You will also in the defense perspective hear from Dr. Brown, a psychiatrist and psychologist from over in Charlottesville. And we suggest it will be nothing more than a scientific version of exactly what you've already heard. But you certainly ought to – you're going to have to weigh all of that.

You will also hear from Drs. Lee and Gwaltney from Central State Hospital. They are forensic psychologists who have weighed the same evidence or much of the same evidence as Dr. Brown. And they have their conclusions. I think you will find that their conclusions don't materially differ. They will differ in shades or degrees. They don't [1252] really differ in the conclusion themselves.

But as I pointed out to you, once you weigh all of this rather specific scientific evidence, you will find that nothing new has really been placed before you. What you will have to do at the end of his hearing, is you will have to balance, as we suggested early on – you will have to balance these things that are in his favor against these horrible things that he has done. And you will have weigh – you will have to decide what the case is worth.

Now, I might as well tell you at this phase of the trial because I think you are entitled to know it – if I'm going to ask for it, you have to be advised of it – the Commonwealth is seeking the maximum penalty. And the Commonwealth will ask you to return the death penalty at the end of this phase. And you should know that up front. It shouldn't be anything that you are not aware of.

You may near during arguments phrases like somebody wants somebody to be killed, and things like that. I

hope that you will weigh [1253] those types of statements appropriately, and realize that lawyers sometimes use emotional appeal to try and sway juries. Ask you to restrain your considerations to the facts you have heard from the stand, what comes from here or off the screen or on the pictures. Deal with the evidence and not the craftiness of the lawyers.

With that in mind, I will yield the floor to Mr. Poindexter. Thank you.

THE COURT: Mr. Poindexter.

MR. POINDEXTER: Thank you, Mr. Meeks. May it please the Court, ladies and gentlemen of the jury, I don't know whether that was a compliment or an insult for him to say that I was crafty. But in my – and I, you know, I wonder about me being crafty here today. We, in the guilt phase of this case, put him on the stand. He talked about his statements. We gave those – we admitted that he gave those statements. He told you – he admitted what he'd done. So if I'm crafty, that is a very unusual way to be crafty.

The question here today – the issue that we have here today – is not his guilt or [1254] innocence. You've already decided that. You've decided that he's guilty. And you've already given him – it's not decided – severe punishment. That's not the question. You've given him severe punishment. He has four life sentences and fourteen years right now.

The question is whether he's going to be executed. That's the question this jury has in front of them. That's

the question. Whether he's going to be executed. Because that is the only question that we have left in this case.

Now, as Mr. Meeks told you, he has – the Commonwealth still has the burden just as it always does – just like Mr. Meeks had when he got the guilty verdict. He had the burden to convince you beyond a reasonable doubt that Doug was guilty of these crimes. And he did that and you returned your verdict. Well, that burden still follows him into this phase. It hasn't got anything to do with guilt, but it follows him into this phase. They have the burden to prove that he should be executed. That's what it amounts to.

Now, I'm allowed to put on mitigation. [1255] And we are going to present – you've heard a lot of this from Doug. He told you about his people. And from other witnesses. We are going to put those people on so you can near them. We want you to hear his relatives as to what happened. We have a doctor here that has done considerable research. We want you to hear that doctor.

And at the end of all this evidence, we are going to ask – and what I say is not evidence. I mean I'm, you know, I'm just a lawyer. Lawyers don't give any evidence. And what Meeks says is not evidence. We are lawyers. We don't have evidence. What you – when you consider all this evidence, we are going to ask that this man, Doug, not be executed because of the mitigation that we are going to present. Thank you.

* * *

[1306] A Yes, sir. We'd want to speak to him. My kids weren't allowed to speak to him on the bus. Wasn't

allowed to ride the same bus – well, they rode the same bus but they couldn't get on at the same time.

Q Tell them about that? Where would the bus stop out there in front of the house?

A Well, the bus had to stop right in front of his yard then come down not too far at my yard and pick up my two girls up cause she didn't want them to be together.

Q Okay.

A And they got on the bus. And they weren't allowed to speak at all. If he did – if my girls say hi or something, the other kids would tell on him. When we saw him out in the yard, we would call him – we didn't want to start trouble or nothing – we'd wave at him, but we, you know, looked a lot at each other. And – it's been really sad and really hard to – to live like that.

Q Did you – did he ever visit you? Ever come over and visit y'all or try to?

A He wasn't allowed to get out of the fence. He wasn't allowed to get out in the road. He was like in prison.

* * *

[1325] A Well, I was out there beside of – walked around beside of a building. He was kind of around behind of a great big building. And so these little boys was out there –

Q You mean the two – his stepbrothers?

A Yeah, they're his stepbrothers.

Q Yeah.

A So they was out there and they was picking them up some of these old bad peaches on the ground. I seen a five-gallon bucket setting over there – over there on their [1326] side of the fence. And I said you boys reach me that bucket over here. I said, I'll get you some good peaches. So they reached me them good peaches – that bucket – it was a white five-gallon bucket. So I climbed up on the tree and I found the best peaches I could get for them, you know, and get a bucket practically full of what I thought the boys could carry. Set them on the fence – over the fence to them. And so the next morning I went back out there and well, the peaches were poured back over on my side of the fence.

* * *

[1383] Next slide. This is a closeup of Thelma Jean Buchanan. This was a photograph that Junior had. It was a newspaper photograph of the announcement of his mother's wedding. This picture was kept under his mattress, secretly hid away from his father and stepmother after his mother's death. As you heard this morning, much of Junior's early childhood rearing was in the responsible hands of his grandparents who live right next door to him.

Next slide. This shows coming out of the cemetery with the gates closed again. The point that I think that I would like to remind the jury of from a professional opinion [1384] standpoint is that the thing that was most disruptive to all of the major people in this series of crimes was death. Junior was only nine years of age when his mother died. Psychologically, it's a well-known fact that a child under ten years of age has great difficulty

dealing with death period – but specifically, dealing with the death of a mother.

Ordinarily, when people – when children lose a parent such as a mother, they can be helped during that time by the love and nurture and care of all the adults around them. It's quite analogous to a child being sexually abused. When a child is sexually abused, the effects of that on the child is determined almost entirely by the way the adults handle that tragedy. But in this particular case, in my professional opinion, no one was able to handle the death of this young woman, only thirty-one years of age at the time of her death.

Her parents handled it, in my professional opinion, that is the grandfather, whom I have interviewed and who has spoke here today, handled it with anger. His father handled it – I never interviewed him, of course – by replacement as soon as possible. Junior handled it by a term technically known as pathological grief. A refusal to grieve. He kept his mother alive by things that belonged to her. This is different from simply having sentimental memories of something. This is a substitute for the real live person.

[1385] I think you heard him testify that he kept rings and slept in the bed with rings that belonged to his mother. He kept this picture close to his bed. The picture – just go back one slide, if you would, Mr. Duval, to the picture of his mother again. He kept this picture, not as a remembrance of his mother because memory is poorly develop before age of ten. He kept it as his mother. He kept his mother alive.

It was not something that he could deal with. He was too young to deal with it. And all around him nobody else was able to deal with it. The real enemy in this particular case is death. No one knew how to deal with it.

And as you know – the next slide. The second slide after that one of you would. Just keep going. It was after his mother's death and then the second early marriage of his father, that these posted signs went up.

* * *

[1394] These crimes were preceded by less than twenty four hours by weekend of assault training with live ammunition, with guns and other things buzzing around him. He came home. While taking off – this was a rainy weekend – took off and was cleaning his clothes; looked up at the picture of his mother and his pregnant wife who was – had three months yet to bear her child – his child. And it's at that point he decided he could no longer tolerate what he'd been through. And that's what motivated him to go up and "try to straighten things out". It's my professional opinion, based on everything that I have reviewed, and my past training experience, that he was under extreme emotional stress at the time of these offenses.

Thank you.

Q Doctor, based on the question that I asked you before, all these reports and examination and all, do you [1395] have an opinion as to what his emotional age is?

A It's my professional opinion that his emotional age became convincingly stunted at about the time of his

mother's death. He is probably emotionally equivalent now to about a ten or eleven year old person.

Q And what would that do to a personality – his reaction to people and his personality to have a stunted age and be eighteen years of age?

A I thinks it makes him a very dependent person, easily influenced by other people. The major decisions in his life, he leaves to other people to make for him. I think it's especially worsened by the fact that he still has not accepted his mother's death, that he is still in the throes of pathological grief or denial of grief. And as I said, I think that it's basically the way he views himself and views the world, that is of a ten-year old child.

Q Do you think that he would be amenable to treatment and adjustment if he was given that option?

A I not only think that, but I have never seen in the twenty years of my experience that kind of a change in a short period of time. And let me remind the jury that I was not treating this young man. I had no doctor-patient relationship with him. I was simply evaluating him, asking him repeatedly to tell me about himself, about his background, about what he did. And to see that documented [1396] amount of change is a extremely encouraging thing with regard to favorable prognosis.

Q You are talking about the lowering of depression and the –

A And the improvement in his self-image. The human figure drawings.

* * *

[1436] Q Go ahead. Tell me what you thought about the –

A Well, I think as I've said he suffers from, in my opinion, the history of having been emotionally abused as a child, of being unable to accept his mother's death, and not being able to grow up emotionally beyond about ten years of age. He's a very compliant, dependent, cooperative kind of a fellow. He responds to leading questions by giving what he anticipates the questioner to want.

[1437] He has been involved in a tragic, emotionally upsetting series of circumstances and his memory is protecting him. Only bits and pieces come back. If he were a real psychopath trying to con me, he would have put forward many, many convincing things to me that would have changed my story about him – my understanding of him and his story. I think that the inconsistencies are attributable to his psychological immaturity and to his – the emotional stress that he's been under most of his life. He's always been in a tug-of-war between a longstanding family feud.

* * *

[1439] Q But it's your opinion that he – I want the psychiatrist's opinion. I'm not –

A All right. It's my opinion that he is a person who is very compliant and cooperative and is easily influenced.

Q All right, now, did he ever show any remorse when you were questioning him?

[1440] A Yes.

Q Tell he jury about that.

A First of all, I was impressed by the fact that I did not see any tears in the many hours that I spent with him. He seemed to have a fairly level of emotion throughout. He was, as I said, cooperative. But I didn't see ordinarily a full range of emotion. I've seen many people who cry over things like this. And many people who are angry. And I saw none of that.

When he was describing the death of his father, he said that after he shot him, he looked at him for about five minutes and that he felt a great deal of hurt and pain. And it seemed to me that I was witnessing he kind of emotional reaction that a person would have under these kind of circumstances, when he was describing it. That is, he was re-living some of that experience. He told me repeatedly how sorry he was and how remorseful he was over the deaths of his two brothers.

Q But he never cried?

A He did not cry in my presence. He told me that he cried many times in the jail.

* * *

[1444] Q What is the main points that you recall that substantiates your position of his mental state?

A That he was – that he – that he had been coping for ten years with the inability to accept the death of his mother. That the attempts on the part of his stepmother and father to wipe from his mind – to brainwash from his

mind – any traces of memories of his mother, had contributed to this [1445] pathological grief reaction. They had stunted his emotional development. He remains today as if he were a ten year old – emotionally developed ten year old who's trying to please and be compliant, but was caught up in the psychological warfare between the extended families –

* * *

[1445] A Well, that at the time of his marriage, instead of being liberated and becoming a separate fully functioning individual, he moved his new wife into his own home. There was not a separation or individuation, as we call it, at all. It was just bringing in and consolidating his dependency on his family. And that this did not get any better. That his family continued to want to control him even after he moved out of their house.

And that then when he had this military weekend, which I think influenced him, and came home and cleaning up [1446] his military uniform, looking once again at his mother. To him it was really, in fact, his mother. Not just a photograph of his mother, but his real – he kept his mother alive. He said he looks at his pregnant wife and says, my baby is not going to be raised this way. And at that time, I think, his mind became overwhelmed with the idea that he had to resolve this festering cancer of ten years.

Q Doctor, part of the statement indicates that he saw things. He was seeing objects that he –

A Yes.

Q – what is the – your opinion on that? What causes that? Is that a –

A He was under extreme emotional stress. As Mr. Meeks point outs – pointed out, in a time of heightened emotion, such as in a combat situation or anything that's emotionally upsetting, as in an automobile wreck or a tragic situation, sometimes the perceptions will be altered. I especially went at a close investigation of that because those are also the symptoms that a person has when they lose contact with reality.

If it had occurred to me, based on my studies of him, that he was no longer in touch with reality as a result of those kinds of symptoms, I would have voted for an insanity plea. But I felt that his mind was coming and going throughout this whole three or four hour episode. There may [1447] be moments in which he lost meaningful contact with reality, but it did not last long enough to cause him to be excused for his criminal design in my professional opinion. But it speaks to the severe emotional stress.

As I said in the last paragraph in my report – it wasn't that he lost contact with reality. He was embedded in the reality of a tragic past. It was that tragic past and that reality that caused him to go into this emotionally overwrought state.

* * *

[1506] Q Yeah. Okay. And y'all somewhat relied on Dr. Brown's report? I mean you didn't take his report. You [1507] relied on parts of it and drew your own conclusion from that report and from the other interview?

A We basically relied on some of the details he reflected and accepted them – his claims of talking with various people – and accepting, for example, the fact that there was no doubt it was a pathological relationship going on during childhood at this, you know.

* * *

[1574] THE COURT: Taking up the instructions for the record, the court has given instruction 1-P offered by the Commonwealth. Are there any objections to that instruction?

MR. EGGLESTON: No objection.

THE COURT: And then the court has given the instruction that has been numbered 2-P, which was offered by the defendant as defendant's instruction A-C, which I refused. I gave the first sentence of that instruction offered by the defendant and declined to give the second sentence. So 2-P embraces the first sentence of instruction A-C offered by the defendant. And objection?

MR. EGGLESTON: Your Honor, I object only to that portion that was refused. We believe that was an accurate statement of law.

THE COURT: All right. Now, we have the verdict form here on the two alternatives and counsel have copies of the verdict form. Are there any objections to the verdict form?

MR. MEEKS: No objection by the [1575] Commonwealth.

MR. EGGLESTON: No objection.

THE COURT: All right. All right. In taking up the other instructions offered by the defendant, several of them were on just one point, about singling out the – any mitigating factors in the instructions which is contrary to Virginia law according to the Supreme Court of Virginia. So the refusal of all of this group of instructions is on the same point.

Instruction A-B was refused on that point. Instruction – well – instruction – I'll group all of them together, Mr. Eggleston. A-B was refused on that point. A-G was refused on that point. A-H was refused on that same point. A-I was refused on the same point. A-J was refused on that same point. Now do you have any objections to the refusal of those instructions all on that general – same point?

MR. EGGLESTON: Yes, Your honor, I do. I'm familiar with the cases that talked about instructing on the mitigating factors. And we object to the refusal of these instructions on [1576] the ground that we believe it's proper to inform the jury of the factors that are set forth in the statute and that was our basis for offering these instructions was because that's the language from the statute. So we object and except.

THE COURT: Well, in at least two cases which have gone all the way to the Supreme Court of the United States, the law in Virginia is that it would be improper to give any of these instructions I just listed – that you – that I refused – A-B, A-E, A-G, A-H, A-I, and A-J.

* * *

[1577] THE COURT: All right. And then for the record, defense counsel confirmed that they withdrew instructions A-D, A-F, A-L, A-M, together with all the verdict forms which they submitted. All of them were withdrawn.

MR. EGGLESTON: Yes, Your Honor. That's correct.

* * *

[1579] THE COURT: Members of the jury, give me [1580] your attention for a short time. It's the duty of the court now to instruct you as to the law applicable in this phase of this proceeding.

You are instructed that you have convicted the defendant of an offense which may be punishable by death. You must decide whether the defendant should be sentenced to death or to life imprisonment.

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan, and Geraldine Patterson Buchanan, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the defendant at death or if you believe from [1581] all the evidence that the death penalty

is not justified, then you shall fix the punishment of the defendant at life imprisonment.

If the Commonwealth has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then you shall fix the punishment of the defendant at life imprisonment.

In order to return a sentence of death, all twelve jurors must unanimously agree on that sentence.

* * *

You have a number of choices, and I'd [1582] like to talk for just a moment about the law so that you understand the state's view in this particular case.

Recall that you did Thursday night, you convicted the defendant of committing all four murders willfully and deliberately and with premeditation in one single transaction. That has already been resolved. So you do not have to go back into the jury room and talk about, was this intentional, was that intentional. You have already resolved all of those questions. And that's where we found ourself yesterday morning and that's where we find ourself this afternoon.

You – as the judge has said – you must decide whether the defendant in this case will be sentenced to death or to life imprisonment. The Commonwealth in this case is asking for the maximum penalty, which is death, and I will give you my reasons a little later.

You should know that in determining under Virginia law with whether a person is entitled to the maximum sentence, that the state only has to prove to you beyond a reasonable doubt certain things. We don't [1583] have to

not prove mitigation. We don't have to not prove what the defense evidence was. What we do have to prove to you is that with respect to the four victims, Douglas McArthur Buchanan, Sr., Donnie Buchanan, J. J. Buchanan, and Jerry – or Geraldine Buchanan, or any one of them – or any one of them – please read this very carefully – that the way in which they were murdered involved torture, depravity of mind or aggravated battery. And that can be torture to any one of them, depravity of mind to any one of them or aggravated battery to any one of them. You may even have a combination of those things.

Now understand when you deal with those variables, it would be quite human nature for twelve people maybe to see different things in different ones – in different factual scenarios concerning the murders of these four individuals. What you must return unanimously, if you come back with the decision, is the death sentence. But you may resolve the differences within the law instruction according to your personal observations of how the law – of how the [1584] murders actually occurred.

That's – and when we talk about torture, depravity of mind, and aggravated battery, those are the three sets of circumstances, individually, or each one of them individually, that describe under Virginia law what is meant by outrageously or wantonly vile, horrible and inhuman.

In fairness to the defendant, understand that even if you find that there was that vileness that you do not have to return the death sentence. I will not suggest that to you. You are entitled to impart your personal judgment

just as much as applying the law in deciding which punishment is fair.

It's a balancing test to a certain degree – a certain degree. On the one hand,

* * *

[1595] So, ladies and gentlemen of the jury, there can be no doubt, I suggest, that beyond a reasonable doubt, with respect to each of the murders, that the test of vileness has been demonstrated. But remember, you've only got to find it as to one.

But that's not the whole story. Then you've got to consider what you have heard the last day and a half – mitigation, history, the things about the defendant, many of which he told you in his statements. You had that information when you went in the jury room on Thursday night. But we have heard it expanded, more clearly defined. We have some agreement among professional psychologists and psychiatrists. We have some disagreement.

But what does it tell us? Let me refer to my notes. First, as I recall – and it really is hard to stretch back over a week and recall everything that everybody said and I'm glad that's your job and not mine. First, was [1596] the witness that I recall – I think there was a Mrs. Cheatham, then there was a Peggy Bolen that testified. Peggy is this boy's aunt, I believe, lives on – if this were the Buchanan house – lives over here on the left, if you are standing out in the road, with her husband, Anthony. And over here lives Linza Bolen.

Now Peggy tells you about the rotten things that happened to this kid when he was coming up. Our Psychologists in the statements say that – that he was kept in the yard. But did you catch the why? Did you catch the why? All through the first part of this trial with the evil parents doing this to this young man, do you remember the questions of the Judge to Peggy Bolen and to Audrey Bolen yesterday? Did you ever go and tell Doug that his wife was welcome in the family? And they both answered no.

What you have is what we have characterized, I suggest, is a feud between the two families. You had the unfortunate circumstance – and certainly you should consider it in this young man's favor – that his mother died at an early age. But the [1597] doctors agree that that alone is certainly not reason for someone to go and take the life of four people.

That happened. And Geraldine and Douglas got married. Everybody agrees on that. And everybody agrees that in about the first year, six months to a year, everything couldn't have been better. It was a nice home, happy neighborhood.

But then the falling out happened with the neighbors on either side, the relatives of the deceased's natural mother, Thelma G. Buchanan. And, I would suggest, what impacted on this young man was not just a product of his mother – or his stepmother and his father, but was a product also of relatives who were not willing to give in. Both sides share some of the blame for the anguish that he must have suffered as a young man. And I do not try

and take any of that anguish away from him. I do want you to consider it.

But you remember the words of Dr. Gwaltney. He says, yeah, I'll bet you there are a lot of people in Amherst County High School that have come from homes where there [1598] was distress of this type. But ladies and gentlemen of the jury, they don't go killing – and kill everybody in the family.

Now, how about the testimony of Peggy Bolen. I think it was Peggy Bolen who said when Doug, Jr. would go to – he was allowed to go to church and he was allowed to participate with youth groups. I think you've got to weigh the testimony of Peggy Bolen and understand that she is definitely for a particular result in this case. And I don't think she came in here and tried to fabricate anything. She just tried to tell it from her best recollection – I hope you will find it that way – but she says – she tells you this rather poignant story about when we went Christmas caroling, he wasn't allowed to get out of the car at any of the relatives' house. That's pretty awful.

Isn't it funny, Reverend Campbell – who took the youth's group – groups out – was also called by the defendant, said no, said he used to participate in all of the functions of the church. Mr. Poindexter asked him how about Christmas caroling. Yeah, he'd go Christmas [1599] caroling. Well, did he get out? Yeah, he did. Every house? Yeah, he did. It shows the type of testimony that you are getting from Mrs. Bolen. I don't blame her for it – and she's entitled to her point of view – but that's what you had. You had a lack of balance. What you have going

on with this young man – yes, he lost his mother at an early age. Yes, his father and his stepmother were not getting along with the grandparents or with the aunt and uncle on the other side. Yes, his father drank on occasion.

But, you know, there was some question and some comment about Doug, Sr. getting some counseling. There had been a fuss in the home about alcohol. How many of you remember the testimony of Officer Geoff Brown that combed that house? You saw how thoroughly they had combed it. They turned that place upside down. Not one ounce of alcohol was found – drugs – none of that stuff.

If this man was the alcoholic he was portrayed as, or as the drinker that he was portrayed as, abusing the child – children, where was the alcohol? Don't alcoholics keep [1600] it in their homes somewhere? Hide it in their closet, put it in a drawer? None.

Next, was the witness, Audrey Bolen. Audrey came in and she told us also about the way Doug, Jr. was treated some of the times that she saw. She told about how her father, Mr. Linza Bolen, grieved for not being able to see the boy and the boy wanted to see his grandfather. But Audrey also answered the Judge's question when she was asked, did you ever welcome Geraldine into the family. She said no. But she participated in this just like the rest of them did.

Audrey also said that she went up there, and that Gerry and Doug and she tried to make peace. But I – if you recall, I asked her on the stand, I said – well, you really weren't interested in patching up with Geraldine or approving the marriage, you just wanted to see the boy? Yes. Well, I would suggest that Doug, Sr. and Geraldine,

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[1440] A Yes.

Q Tell he jury about that.

A First of all, I was impressed by the fact that I did not see any tears in the many hours that I spent with him. He seemed to have a fairly level of emotion throughout. He was, as I said, cooperative. But I didn't see ordinarily a full range of emotion. I've seen many people who cry over things like this. And many people who are angry. And I saw none of that.

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Q But he never cried?

A He did not cry in my presence. He told me that he cried many times in the jail.

* * *

[1444] Q What is the main points that you recall that substantiates your position of his mental state?

A That he was – that he – that he had been coping for ten years with the inability to accept the death of his mother. That the attempts on the part of his stepmother and father to wipe from his mind – to brainwash from his

mind – any traces of memories of his mother, had contributed to this [1445] pathological grief reaction. They had stunted his emotional development. He remains today as if he were a ten year old – emotionally developed ten year old who's trying to please and be compliant, but was caught up in the psychological warfare between the extended families –

* * *

[1445] A Well, that at the time of his marriage, instead of being liberated and becoming a separate fully functioning individual, he moved his new wife into his own home. There was not a separation or individuation, as we call it, at all. It was just bringing in and consolidating his dependency on his family. And that this did not get any better. That his family continued to want to control him even after he moved out of their house.

And that then when he had this military weekend, which I think influenced him, and came home and cleaning up [1446] his military uniform, looking once again at his mother. To him it was really, in fact, his mother. Not just a photograph of his mother, but his real – he kept his mother alive. He said he looks at his pregnant wife and says, my baby is not going to be raised this way. And at that time, I think, his mind became overwhelmed with the idea that he had to resolve this festering cancer of ten years.

Q Doctor, part of the statement indicates that he saw things. He was seeing objects that he –

A Yes.

Q – what is the – your opinion on that? What causes that? Is that a –

A He was under extreme emotional stress. As Mr. Meeks point outs – pointed out, in a time of heightened emotion, such as in a combat situation or anything that's emotionally upsetting, as in an automobile wreck or a tragic situation, sometimes the perceptions will be altered. I especially went at a close investigation of that because those are also the symptoms that a person has when they lose contact with reality.

If it had occurred to me, based on my studies of him, that he was no longer in touch with reality as a result of those kinds of symptoms, I would have voted for an insanity plea. But I felt that his mind was coming and going throughout this whole three or four hour episode. There may [1447] be moments in which he lost meaningful contact with reality, but it did not last long enough to cause him to be excused for his criminal design in my professional opinion. But it speaks to the severe emotional stress.

As I said in the last paragraph in my report – it wasn't that he lost contact with reality. He was embedded in the reality of a tragic past. It was that tragic past and that reality that caused him to go into this emotionally overwrought state.

* * *

[1506] Q Yeah. Okay. And y'all somewhat relied on Dr. Brown's report? I mean you didn't take his report. You [1507] relied on parts of it and drew your own conclusion from that report and from the other interview?

A We basically relied on some of the details he reflected and accepted them – his claims of talking with various people – and accepting, for example, the fact that there was no doubt it was a pathological relationship going on during childhood at this, you know.

* * *

[1574] THE COURT: Taking up the instructions for the record, the court has given instruction 1-P offered by the Commonwealth. Are there any objections to that instruction?

MR. EGGLESTON: No objection.

THE COURT: And then the court has given the instruction that has been numbered 2-P, which was offered by the defendant as defendant's instruction A-C, which I refused. I gave the first sentence of that instruction offered by the defendant and declined to give the second sentence. So 2-P embraces the first sentence of instruction A-C offered by the defendant. And objection?

MR. EGGLESTON: Your Honor, I object only to that portion that was refused. We believe that was an accurate statement of law.

THE COURT: All right. Now, we have the verdict form here on the two alternatives and counsel have copies of the verdict form. Are there any objections to the verdict form?

MR. MEEKS: No objection by the [1575] Commonwealth.

MR. EGGLESTON: No objection.

THE COURT: All right. All right. In taking up the other instructions offered by the defendant, several of them were on just one point, about singling out the – any mitigating factors in the instructions which is contrary to Virginia law according to the Supreme Court of Virginia. So the refusal of all of this group of instructions is on the same point.

Instruction A-B was refused on that point. Instruction – well – instruction – I'll group all of them together, Mr. Eggleston. A-B was refused on that point. A-G was refused on that point. A-H was refused on that same point. A-I was refused on the same point. A-J was refused on that same point. Now do you have any objections to the refusal of those instructions all on that general – same point?

MR. EGGLESTON: Yes, Your honor, I do. I'm familiar with the cases that talked about instructing on the mitigating factors. And we object to the refusal of these instructions on [1576] the ground that we believe it's proper to inform the jury of the factors that are set forth in the statute and that was our basis for offering these instructions was because that's the language from the statute. So we object and except.

THE COURT: Well, in at least two cases which have gone all the way to the Supreme Court of the United States, the law in Virginia is that it would be improper to give any of these instructions I just listed – that you – that I refused – A-B, A-E, A-G, A-H, A-I, and A-J.

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[1577] THE COURT: All right. And then for the record, defense counsel confirmed that they withdrew instructions A-D, A-F, A-L, A-M, together with all the verdict forms which they submitted. All of them were withdrawn.

MR. EGGLESTON: Yes, Your Honor. That's correct.

* * *

[1579] THE COURT: Members of the jury, give me [1580] your attention for a short time. It's the duty of the court now to instruct you as to the law applicable in this phase of this proceeding.

You are instructed that you have convicted the defendant of an offense which may be punishable by death. You must decide whether the defendant should be sentenced to death or to life imprisonment.

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan, and Geraldine Patterson Buchanan, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the defendant at death or if you believe from [1581] all the evidence that the death penalty

is not justified, then you shall fix the punishment of the defendant at life imprisonment.

If the Commonwealth has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then you shall fix the punishment of the defendant at life imprisonment.

In order to return a sentence of death, all twelve jurors must unanimously agree on that sentence.

* * *

You have a number of choices, and I'd [1582] like to talk for just a moment about the law so that you understand the state's view in this particular case.

Recall that you did Thursday night, you convicted the defendant of committing all four murders willfully and deliberately and with premeditation in one single transaction. That has already been resolved. So you do not have to go back into the jury room and talk about, was this intentional, was that intentional. You have already resolved all of those questions. And that's where we found ourself yesterday morning-and that's where we find ourself this afternoon.

You – as the judge has said – you must decide whether the defendant in this case will be sentenced to death or to life imprisonment. The Commonwealth in this case is asking for the maximum penalty, which is death, and I will give you my reasons a little later.

You should know that in determining under Virginia law with whether a person is entitled to the maximum sentence, that the state only has to prove to you beyond a reasonable doubt certain things. We don't [1583] have to

not prove mitigation. We don't have to not prove what the defense evidence was. What we do have to prove to you is that with respect to the four victims, Douglas McArthur Buchanan, Sr., Donnie Buchanan, J. J. Buchanan, and Jerry – or Geraldine Buchanan, or any one of them – or any one of them – please read this very carefully – that the way in which they were murdered involved torture, depravity of mind or aggravated battery. And that can be torture to any one of them, depravity of mind to any one of them or aggravated battery to any one of them. You may even have a combination of those things.

Now understand when you deal with those variables, it would be quite human nature for twelve people maybe to see different things in different ones – in different factual scenarios concerning the murders of these four individuals. What you must return unanimously, if you come back with the decision, is the death sentence. But you may resolve the differences within the law instruction according to your personal observations of how the law – of how the [1584] murders actually occurred.

That's – and when we talk about torture, depravity of mind, and aggravated battery, those are the three sets of circumstances, individually, or each one of them individually, that describe under Virginia law what is meant by outrageously or wantonly vile, horrible and inhuman.

In fairness to the defendant, understand that even if you find that there was that vileness that you do not have to return the death sentence. I will not suggest that to you. You are entitled to impart your personal judgment

just as much as applying the law in deciding which punishment is fair.

It's a balancing test to a certain degree – a certain degree. On the one hand,

* * *

[1595] So, ladies and gentlemen of the jury, there can be no doubt, I suggest, that beyond a reasonable doubt, with respect to each of the murders, that the test of vileness has been demonstrated. But remember, you've only got to find it as to one.

But that's not the whole story. Then you've got to consider what you have heard the last day and a half – mitigation, history, the things about the defendant, many of which he told you in his statements. You had that information when you went in the jury room on Thursday night. But we have heard it expanded, more clearly defined. We have some agreement among professional psychologists and psychiatrists. We have some disagreement.

But what does it tell us? Let me refer to my notes. First, as I recall – and it really is hard to stretch back over a week and recall everything that everybody said and I'm glad that's your job and not mine. First, was [1596] the witness that I recall – I think there was a Mrs. Cheatham, then there was a Peggy Bolen that testified. Peggy is this boy's aunt, I believe, lives on – if this were the Buchanan house – lives over here on the left, if you are standing out in the road, with her husband, Anthony. And over here lives Linza Bolen.

Now Peggy tells you about the rotten things that happened to this kid when he was coming up. Our Psychologists in the statements say that – that he was kept in the yard. But did you catch the why? Did you catch the why? All through the first part of this trial with the evil parents doing this to this young man, do you remember the questions of the Judge to Peggy Bolen and to Audrey Bolen yesterday? Did you ever go and tell Doug that his wife was welcome in the family? And they both answered no.

What you have is what we have characterized, I suggest, is a feud between the two families. You had the unfortunate circumstance – and certainly you should consider it in this young man's favor – that his mother died at an early age. But the [1597] doctors agree that that alone is certainly not reason for someone to go and take the life of four people.

That happened. And Geraldine and Douglas got married. Everybody agrees on that. And everybody agrees that in about the first year, six months to a year, everything couldn't have been better. It was a nice home, happy neighborhood.

But then the falling out happened with the neighbors on either side, the relatives of the deceased's natural mother, Thelma G. Buchanan. And, I would suggest, what impacted on this young man was not just a product of his mother – or his stepmother and his father, but was a product also of relatives who were not willing to give in. Both sides share some of the blame for the anguish that he must have suffered as a young man. And I do not try

and take any of that anguish away from him. I do want you to consider it.

But you remember the words of Dr. Gwaltney. He says, yeah, I'll bet you there are a lot of people in Amherst County High School that have come from homes where there [1598] was distress of this type. But ladies and gentlemen of the jury, they don't go killing – and kill everybody in the family.

Now, how about the testimony of Peggy Bolen. I think it was Peggy Bolen who said when Doug, Jr. would go to – he was allowed to go to church and he was allowed to participate with youth groups. I think you've got to weigh the testimony of Peggy Bolen and understand that she is definitely for a particular result in this case. And I don't think she came in here and tried to fabricate anything. She just tried to tell it from her best recollection – I hope you will find it that way – but she says – she tells you this rather poignant story about when we went Christmas caroling, he wasn't allowed to get out of the car at any of the relatives' house. That's pretty awful.

Isn't it funny, Reverend Campbell – who took the youth's group – groups out – was also called by the defendant, said no, said he used to participate in all of the functions of the church. Mr. Poindexter asked him how about Christmas caroling. Yeah, he'd go Christmas [1599] caroling. Well, did he get out? Yeah, he did. Every house? Yeah, he did. It shows the type of testimony that you are getting from Mrs. Bolen. I don't blame her for it – and she's entitled to her point of view – but that's what you had. You had a lack of balance. What you have going

on with this young man – yes, he lost his mother at an early age. Yes, his father and his stepmother were not getting along with the grandparents or with the aunt and uncle on the other side. Yes, his father drank on occasion.

But, you know, there was some question and some comment about Doug, Sr. getting some counseling. There had been a fuss in the home about alcohol. How many of you remember the testimony of Officer Geoff Brown that combed that house? You saw how thoroughly they had combed it. They turned that place upside down. Not one ounce of alcohol was found – drugs – none of that stuff.

If this man was the alcoholic he was portrayed as, or as the drinker that he was portrayed as, abusing the child – children, where was the alcohol? Don't alcoholics keep [1600] it in their homes somewhere? Hide it in their closet, put it in a drawer? None.

Next, was the witness, Audrey Bolen. Audrey came in and she told us also about the way Doug, Jr. was treated some of the times that she saw. She told about how her father, Mr. Linza Bolen, grieved for not being able to see the boy and the boy wanted to see his grandfather. But Audrey also answered the Judge's question when she was asked, did you ever welcome Geraldine into the family. She said no. But she participated in this just like the rest of them did.

Audrey also said that she went up there, and that Gerry and Doug and she tried to make peace. But I – if you recall, I asked her on the stand, I said – well, you really weren't interested in patching up with Geraldine or approving the marriage, you just wanted to see the boy? Yes. Well, I would suggest that Doug, Sr. and Geraldine,

who we've had to characterize even though they're dead and gone, were there and they may have very well have sensed, yeah, you just ınt to come and see the boy, you're really not interested in [1601] the fact that we are married and have a home and we're trying to put our family together.

Then you have Mr. Linza Bolen. An absolutely delightful gentleman. I think – I think it was really quite moving to see him come into the courtroom. Linza told about the disagreements in the family. He told of one incident where he went over and I believe the way he put it – I think he put it right at the end of his testimony – he said that Peggy and Anthony were fussing with Geraldine and Douglas, and they were all out there at the fence, and he went out there and threatened to whip them all if they didn't behave themselves. And I suspect he might have tried it if they hadn't behaved themselves.

One thing that's interesting, I think, in listening to Linza's testimony and listening to Audrey's testimony and listening to Peggy's testimony. You remember the defendant testified that my parents would get out there and they'd all get guns and waive them at each other. Remember that. That was back a few days now. Remember, he said they'd go out in the back yards and they'd fight with the [1602] relatives and would waive [sic] guns. Did you hear any of those three people mention anything about guns? I think they asked Mr. Linza Bolen – They said, did you ever see Doug, Sr. and Geraldine fight out in the back yard. He said, no, never did. So you – again, you have the defendant trying to exaggerate what went on in that home.

Then you have Reverend Campbell. And I think I've probably already in passing mentioned his testimony. He said, yes, it was a troubled home, but says the boys came to church – all three of them. He said their parents took them. I think that's what parents are supposed to do. If they don't go themselves, they certainly should take their children.

Then you hear Dr. Brown. Dr. Brown is a man with extremely impressive credentials, as are Drs. Lee and Gwaltney – men of tremendous experience. Doctors – and – and the doctors agree on a number of things and they disagree on a few things. But Dr. Brown said that he talked to the defendant for twenty and a half hours. He must have told you that five [1603] or six times. And Dr. Brown never heard anything about a suicide. He never heard anything about intentionally cutting Geraldine's throat. He didn't hear a lot of things. I suggest – I do not suggest that Dr. Brown would come in and fabricate any of his testimony. I will not suggest that to you. I suggest he didn't get accurate information from the defendant.

I also would recall to you what Dr. Brown said, that if he got inaccurate information, it could invalidate the parts – some of the conclusions that he drew. And I think you are entitled to consider that. If he got bad information – if he didn't find out what you have already found out, how could he possibly give you the evaluation that he did? The other thing about Dr. Brown's testimony – I don't want to spend too – too long a period of time on it. We had a lot of scientific testimony. And I think what you – in reviewing it you should try and get not only the individual details of the testimony, but a flavor for what it is these doctors are talking about.

[1604] You recall, Dr. Brown and I entered into a question and answer session. And Dr. Brown said that the defendant in this particular case was easily suggest – easily led. Easily led. Dr. Lee disagreed and Dr. Gwaltney disagreed.

Do you remember why Drs. Lee and Gwaltney disagreed? Officer Doss of our Sheriff's Department, interviewed the defendant repeatedly for hours on end in the days right after this homicide – on and on and on. Were you even in the Naola area? No. Do you know anything about the killings? No. Is this – are these the answers of somebody that's easily led? In Albuquerque they go in to interview him. Read it. It's in the transcript. That portion's there. Doug, we are here – you know what we are here to talk to you about? Yeah. You did it, didn't you? No. It's that simple. That's easily led?

He did not even admit participation in these events until they took a tape recording of his wife, brought it – put it down in front of him, and said now, will you tell us you did it? And he said, yes. You mean to tell me [1605] that somebody who is easily led, resisted giving one single detail for almost a month and a half, and with repeated questioning by the law enforcement authorities of this county and of the regional homicide squad? I hope that doesn't wash with you.

Now, I do hope, however, that you recall the two other professionals who say that they have reviewed all of the same evidence you have seen, plus the additional interviews, plus Dr. Brown's material, and they did not find him easily led. Another thing about Dr. Brown's report – and there are a number of things that I am sure

Mr. Poindexter will point out to you about it – but if you recall, Dr. Brown testified, as did Drs. Lee and Gwaltney, that this defendant has an exceptionally or a – certainly better than average IQ. If I recall the number – I don't see it here – it's in the hundred and nineteen – hundred and twenty-one range. And we're not talking about somebody of weak mind that can't understand what's going on and can't resist what was happening to him.

But there was a test called the [1606] Minnesota Multiphasic Inventory. You remember the slides, and they put up the graph, and they showed how many points up it was above and how many points down below. And then you Had Dr. Lee and he had his test. And he went over the results. And Dr. Lee – he said that Dr. Gwaltney – I mean that Dr. Brown and he agreed with the test results.

Now, Dr. Lee gave an interpretation that is consistent with what I'm about to address to you. Dr. Brown looked at the same results and said these – this is the analysis of a computer – an unbiased machine. Machines don't think. They just do whatever they do. This is the analysis that came out. He just happened to disagree with it. He says in looking at the MMPI that the defendant's responses to this test indicated that he is immature, compulsive and hedonistic – the means pleasure-seeking, does whatever he wants to do, and that he frequently rebels against authority. He is hostile, quite aggressive, and often frustrated. He seems to be unable to learn from punishing experiences. That's what he testified – he agreed that that [1607] was what the test said. And repeatedly gets into the same types of problems. That's the man you are asked to give a fair sentencing.

Many individuals with this profile develop severely addictive problems and frequently have legal, family, and work difficulties. And catch this? You saw the defendant testify from the stand. We – I saw – I saw, and I hope you saw, no emotion whatsoever. The doctor explained it to a certain degree. But here's what his test says. He may appear charming and intends to make a good first impression, but he is superficial, selfish, hedonistic and untrustworthy in interpersonal relations. That's what the test showed. In addition, he is likely to be openly hostile and resentful.

I think you saw a pretty good example of that, or I hope you find that you saw a pretty good example of that, on the afternoon of September 15th. Openly hostile and resentful is, I suggest, a pretty good way of describing him. He says – the doctor says he feels like he is rehabilitable – whatever that means. You have heard Dr. Gwaltney ask basically he said, [1608] well, what do you mean "rehabilitable". He doesn't have a personality disorder. What is it you are trying to rehabilitate? Yes – any – I suppose anybody who has a few – who has hangups or problems can benefit from psychotherapy, but that Drs. Gweltney and Lee – a mouthful – Drs. Gwaltney and Lee certainly don't suggest that he has any illness, nor does Dr. Brown, really.

But the MMPI says this about rehabilitation. It says – it says his MMPI profile is a highly persistent one suggesting a long history of personality problems that are not likely to change significantly. You should keep that very much in mind.

Then after Dr. Brown completed his testimony, if you ladies and gentlemen will recall, I called a series of witnesses to the stand. I'd just like to briefly review their testimony. I apologize in advance for the length of my argument because there is just so much material we have listened to in the last five weeks – five days, I'm sorry.

I do want to remark a couple of other [1609] things about Dr. Brown's testimony. Dr. Brown gave a presentation – very impressive – in fact, he told you it was done by a professional photographer. He told us what his sons did for a living and he showed us eight or ten slides of the fence. Well, y'all saw the fence. It's there. I'm not trying to take down a fence. The fence is there and it's got no trespassing signs on it. He and his professional photographer had Linza stand in the gateway and look over across the fence. He and his professional photographer had the peach bucket there. We've never denied those things occurred. But unlike the slide presentation was geared to do, you should keep them in balance.

Yes, he showed us four or five distance views and got closer and closer to Thelma Jean's grave had showed us her picture at least three times. But I ask you not with your mind to bring those things out of focus, but to treat them along with all of the other evidence. We showed you a lot of slides, too. It's not a battle of slides, ladies and gentlemen. The slides and the information was [1610] brought to you because we had almost two hundred exhibits, and there was just no other logical way to bring all of these bullets and the gun, pieces of rug and glass that was laying on the floor, and the book bag. The easiest way in the world to bring those to you was to bring them

to you by pictures. Certainly, we didn't take a professional photographer out there. We took a forensic man from the Lynchburg Police Department, who tried to give you the best pictures he could.

But you remember Dr. Brown – getting back to where I was – remember Dr. Brown, after he gave his testimony, was cross-examined. And I asked him a series of questions. And he acknowledged that Douglas was a gifted child. He had a 121 IQ. And he acknowledged that the act of wearing gloves would be consistent with a person who was carrying out a plan. He agreed that a person who dragged bodies off in sequence so the next victim or series of victims wouldn't see it would be consistent with someone carrying out a plan. He agreed that putting the gun against the head of your victim and pulling the trigger in execution [1611] style would be consistent with someone carrying out a plan. He agreed that someone parking their vehicle in an area remote from the scene of the crime would be consistent with someone carrying out a plan.

And though he wanted to argue about the meanings of the statements to the police about Douglas and his wife, Christianne, planning this on Monday and going to the area prepared to commit the offense and then aborting it and going to the area on the parkway on Tuesday, those facts are there. Those facts are there. Read them in the transcript. The doctor can argue all he wants about what they mean, but they are there. Dr. Lee and Dr. Gwaltney had no problem with taking the facts as they are and they've had the benefit not only of all the things you've had, they also had the benefit of all of Dr. Brown's research.

Then as I had mentioned to you, I called a series of witnesses. They give you little bits and snapshots of what happened in Douglas's life. You are to consider and to weigh and to try and draw these things that have happened into perspective.

[1612] I called back Ann Campbell, who was our first witness in this case. Remember her? She – Reverend Campbell's daughter-in-law. She worked at the nursery. She was a classmate of Geraldine in college. She had known Geraldine for a number of years. She – she said yes, she said she knew that there had been some problems in the Buchanan family. And then she said what I think is one – or I hope you will find is one of the most chilling things that has happen – that was said in this trial. She said, you know, it was just the last afternoon that I saw her. We were talking and she said, you know, I made some mistakes early on with Douglas. But we have put those aside. Things are good now. Less than forty-eight hours later, he darn near cut her head off.

Then remember the testimony of Lee Denton. You remember Lee Denton. He was the young man who came in and had on the loose waisted white shirt. I would trust you could see he was very nervous – he didn't want to be here. He characterized himself as this defendant's best friend. I suggest it probably was no fun for him to come into a [1613] trial like this and have to testify about his best friend.

They had known each other since, if I recall, junior high school, and he started going to his house late in the defendant's high school career. Of course, he could not

have any personal knowledge of the things that happened when Douglas, Jr. was growing up, but he characterized that the household was one that the people got along. He characterized it as a normal household.

He was asked to compare who got along better with the defendant, Douglas, Sr. or the mother. He said well mom – his mom did. He said she was really neat. In fact, she used to scold the two of us when we'd go out. Said don't get into any trouble. Nothing unusual there. But another snapshot of what went on in the Buchanan household in the last couple of years.

Then you remember Ben Harrison. You remember Dr. Gwaltney – Dr. Brown's testimony? Dr. Brown brought out that just before this happened the defendant had been to National Guard training and had been near a live fire [1614] course. Remember how Ben Harrison, the young Liberty student, characterized that? He's the assistant mortar man to this fellow. He said, yeah, we were there. There one day. No, we didn't participate in the live fire. And I said, well is this live fire like where you get down on the ground. You have all seen these training flicks on the television where they get up under the barbed wire and the machine guns and shoot. No – no – no – They were just firing some live rounds. Well, where were you? Well, we were about a hundred and fifty feet away, and we had on ear plugs, and we were handing out ammunition. I guess Dr. Brown just wanted to mention that to you. I don't know why he would find it significant, and I hope you don't either.

Then we brought in for you to consider, Johnny Patterson. Johnny is – lives out in Richlands, Virginia. And

Johnny was this young man's uncle, I believe – was Geraldine's brother. And he admitted that Geraldine perceived that her husband had a drinking problem. He said that he would visit them several times a year. Said they seemed like a [1615] normal, happy family to him.

Said one thing he was for sure that he never – he never saw any mistreatment of the children. Another snapshot taking in bits and pieces of time I believe he said over he last seven years – or last several years – to show you that this was not some hell hole for this young man to have been living in that drove him to do what he did. He lived in a home that had some problems, but certainly does not excuse the systematic execution of four people.

Finally, before we called the doctors to the stand we put on Patsy Crouse, who is Doug, Sr.'s sister. Patsy said yes, there's some families in the problem. Said yes, Doug, Sr. drank quite a bit. He had a drinking problem – and it bothered Geraldine I believe she – I believe she stated that when Mr. Poindexter asked her some questions. She said he was a loving father. Said that Geraldine and he were both very concerned that all three children would be treated the same. These certainly are not portraits or the snapshots of monsters who deserved to be executed on *United States v. Moses*, 106 F. 3d 1273 (6th Cir. 1997) (reversing upward departure to lengthen sentence of dangerous defendant); [1616] September 15th.

And so, ladies and gentlemen, the question comes down after you look at all of this evidence and I hope the answer is obvious to you. After you look at Dr. Lee's testimony and what he – I'll just throw this at you – here

were the results that he testified to from his MMPI. He's testified to you that Mr. Buchanan's responses of the self-reporting personality inventory showed that he was self-centered, impulsive and exploitive and said people of this type are self-indulgent, lack planning or foresight, and often find themselves in financial, legal and interpersonal difficulties. It sounds very much like Dr. Brown's report, doesn't it? He goes further. He says such a result suggests a lack of remorse and concern over what happened. Self-centered, hedonistic and indifferent to the needs and feelings of others. Sounds like Dr. Brown's report.

Finally, this morning you had Dr. Gwaltney. Dr. Gwaltney testified to you in perhaps a little different format from that that you heard from the other two doctors. He [1617] talked about the three things that were required – he was required by the court to find. He had – he said – let's deal with the first one, was mitigating circumstances – and he admits, as does the Commonwealth, that there were some crummy things that happened to this young man in his home life. Then he was asked to deal with whether, at the time of the event, he was under extreme emotional – under the control of extreme emotional factors. He said the facts just don't bear it out.

He's a forensic psychologist. He's been doing this thing since 1968 – or '58, if I recall his testimony. He's worked for the Department of Justice. Just as Dr. Brown's credentials are very impressive as well. But how about what Dr. Lee told you. Is Dr. Lee somebody – I mean Dr. Gwaltney, is he somebody that's an employee of the state to come up and help out the Commonwealth Attorney when he's trying a case? Dr. Gwaltney says that he has

testified in a number of capital trials. This is first time he has ever testified for the Commonwealth. In every other instance, he has testified for the defense. That ought to [1618] tell you something. That ought to tell you something about his testimony.

* * *

[1620] Ladies and gentlemen of the jury, I've got to explain to you why I feel you should return the maximum penalty in this case. I know that deep down in some of your hearts, there is a reserve. I trust that all of you have had human compassion and decency. I hope you will find that Mr. Poindexter and I have those same characteristics. But that's not what this case is about.

This case is about three things, as I see it – and I hope you review that – one is duty, one is expression to the public for what the standard of justice is that comes in this courtroom, and the third one is that the [1621] defendant has put himself where he is today. He has forfeited his rights.

* * *

[1624] Now, there is something in the law that's called mitigation. Now mitigation – that doesn't mean that he is – that doesn't mean that he's making an excuse. Mitigation is not excuse. There's no excuse for what he did. But there – the law in its wisdom has given a jury and the court – if it's in the breast of the court – a way to weigh all the facets of a man's background, and the facets of any [1625] pressure that he happened to be under at the time that the act that he's charged with occurred. And if they think, in their wisdom, that there is some factor

that has redeeming value or there is some factor that means that he has some, not excuse – but some reason not to get the death penalty, then you have a right to take that into consideration and give him life in prison.

Now, the court – the jury – I keep saying the court, but the court and the jury can consider almost anything. There are certain facts that are set down in the statute, but practically any factor can be considered in mitigation.

Now, one of the factors, for example, is youth. That's set in the code. Youth is one of the factors that you can take in consideration. It doesn't say emotional age. Although Dr. Brown says that his emotional age is ten years of age. But his actual chronological age was nineteen at the time that he did this. That's youth. And you can take his youth in consideration.

Now, it doesn't say that you take his [1626] youth in consideration because he might have an opportunity to be rehabilitated. It doesn't say that. But that is a factor. I mean he's nineteen years of age and these psychiatrists and psychologists here said that he might be amendable to rehabilitation. So that is – that's one factor you take in consideration when you come to your decision – not whether he's guilty; God knows he's guilty and I'm not saying he's not – but when you decide whether you're going to electrocute him or not.

Now, the other things that you can take in consideration, and I'm going to read them because I don't want to mislead you in any way. And we're trying not to do that. We've tried to be honest with you in this case. The others

– he had no criminal record. Does the man have a criminal record? Now Doug Buchanan has no criminal record. None was –

MR. MEEKS: Your Honor, I've got to object to that. There was no evidence either way – either way –

MR. POINDEXTER: And that's why I can –

MR. MEEKS: – before the court.

MR. POINDEXTER: – that's a negative. And I can introduce that.

THE COURT: The objection is overruled. Go ahead.

MR. POINDEXTER: That's a negative. Mr. Meeks – do you think that Mr. Meeks wouldn't have – wouldn't have introduced a criminal record if he had a criminal record? He hadn't got any criminal record, because that was one of the elements for what Mr. Meeks is trying to prove when he asked for the death penalty. He has no criminal record. None whatsoever. Not any.

All right. As I said, there are all sorts of facts you can take into consideration. But I'm going to read to you three others. We call your attention to three others. One of them – the second one that I would like to call your attention to – is that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Let's take that one next. Now, these doctors got on the stand. And you know psychology and psychiatry is not a fixed or certain science. They can – [1628] with their knowledge and all these doctors had vast knowledge, had talked. They were good – mine was good. Dr. Brown was good. The other

two were good. I don't suggest that they were not. But they all got on the stand and all said that he had a turbulent childhood – a terrible childhood. All their disagreement was is how it affected him, how bad that effect was on him.

I suggest to the jury that that had a terrible effect on him. And for anybody to submit to this jury that it didn't have a terrible effect on him when all three of the doctors say so, when his parents say – and what is the worse effect it had on him? Well, Linza Bolen came in here, and Linza Bolen was his grandfather, and Linza Bolen had been bonded with him since he was two years of age until he was nine or ten when his mother died. And they took that child away from Linza.

You'll have to excuse me. Sam and I have been living with this case. They took him away from Linza. Now why? Why did they do that? Do you think they did that because Linza was arguing with them? There's no [1629] evidence that Linza ever argued with them. He never – there's not a smidgen of evidence. It was his – the children – the children were always fighting. They were fighting each other. But Linza – that old man – there's no evidence that they ever had a argument. And I suggest to you that was traumatic for this child. Traumatic. He never has recovered from that.

So, I won't go into all the other evidence. You've heard it. You saw the fences, didn't you? The fences around his house. He was fenced in like a dog. There is no question there – and that's why Dr. Brown had all these pictures. That's why he had these pictures here and showed them to you.

Not only was he fenced in, but his mother was fenced in. He took with him a picture of his mother all the time. And Dr. Brown – the psychiatrists don't agree why he did that. Dr. Brown said his mother was alive. That was his mother. He kept her with him. He kept his mother – he kept the mother's jewelry. Kept the mother's jewelry until they took it away from him. You know what a security [1630] blanket is? You got kids? That was his security blanket. But it was more than a security blanket. It was actually his mother. Actually his mother. I suggest to you that that's a terrible, terrible psychological position for the child to be in.

Not only that. There's been testimony here of how well they got on. How nice they were to each other. But that was just only part of the time. The rest of the time they weren't nice to each other. They were arguing, fighting, I don't – I'm not going to argue with Mr. Meeks as to who had the gun. I don't think that's important. We know from the evidence that they – who – I mean who was fighting with Doug and who was fighting with each other. We know from the overwhelming evidence that they were doing that. We know it. I mean, can it be doubt in the jury's mind? There's none in my mind from hearing the evidence from this stand. They fought all the time. They – and we're not trying to demean anybody. That's not our purpose.

They had a problem with drinking. I mean there's no question about it. They had a [1631] problem with drinking. He lived though that. He was caught between all that fighting.

Now, what did that do to him? Well, what would it do to anybody? Suppose if we were at work and one day our boss – and, you know, when you're nine years old your parents are – and your step-parents are your boss. They tell you what to do. And one day you come in and your boss would say – well, you know you are the smartest fellow. You're the best lawyer I've ever seen. You're just wonderful. Come tonight and have supper with me. And you'd say, well isn't that wonderful. I'm accepted. I'm a good lawyer. I'm going to make partner. Sam, going to make partner in the firm. And the next day you came in and he said, you S.O.B., you are the dumbest guy I've ever seen in my life. I may fire you next week. Well, that's what Doug lived through. All his life.

One day they were nice to him and the next day they were getting ready to fire him, to get rid of him, to lock him in his room. That's like on a roller coaster. Ummm-mmmmm. One – and that's worse. You know, if they hadn't done that – if they hadn't done that to [1632] him, he – this crime would never had happened. You know why? Because he would have never wanted to go back there. He would have never wanted to go back inside that fence again if they'd done that. He would have hated them. But he had a terrible hate/love relationship. A terrible hate/love relationship. He wanted to be with them. And yet, when he was with them, sometimes they were nice to him and sometimes they rejected him.

So I suggest to you that the emotional disturbance, mental and emotional disturbance – and what this jury has got to decide is whether that was enough to mitigate this terrible, terrible crime. And that is going to have to

be your decision. Was that enough for him to do what he did?

The Commonwealth has tried to say that he had no remorse. Well, what is remorse? I mean, what would remorse do – how would somebody be remorseful if they'd had to hide their feelings? You know, when you – if my boss – if my boss when I go to work one day is nice to me and the next day ain't so nice to me, then I'm going to withdraw in myself. And [1633] I'm going to be careful what I say to him when I come into the office. And finally, it will – and that's – that's not even a smidgen – not even a smidgen to what it is when you have – when you have a parent – a dependant [sic] child – a nine-year old boy. You are going to withdraw into yourself. And finally you stay in yourself. You stay in yourself. Now why should you go out and say, Geraldine, I love you, when you don't know what's going to happen? You're very, very careful of what emotions you show and what you don't show.

And I suggest to you that that is what has happened to him. He has a hard time expressing himself to his lawyers, to the psychiatrists, to the jury. He can't cry. He – well, I shouldn't be testifying. I don't – I don't know that; but, it seems to me, looking at him, he can't get it out. He can't get it out of himself.

Now, I want to acknowledge this jury's anger. I know you're mad. I don't blame you for being mad. When I read the thing, I was mad, too, and I represent him. But a decision of whether he should go to the electric chair [1634] shouldn't be made because you are mad. That's not

what it is made on. It's made on whether there is mitigating circumstances. Not excuse, but mitigating circumstances. That's what it is made on. Not anger.

Life in this country is precious, and whenever you see something like this, it makes you mad. And I understand that. I know. I can understand that perfectly. It comes from the preciousness of life, is what it comes from. I have so much to say, and I don't want to bore you. I just don't know how to start.

But I'm going to go – I'm going to another one of the requirements. At the time of the commission of the capital felony – the felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired. Now, I submit to the jury that it was.

And to prove that, I'm going to read you parts of the first statement he gave. I want

* * *

[1639] Does that show that he was vicious? He was talking about his brother. That showed he was vicious? Why did he do that? There can be only one explanation. And I'll read you some – could be only one explanation. He was under a strong emotional influence. Strong. There's no other explanation.

* * *

[1644] And it goes on and on. There are other things. Like the two pauses – indications. Indication to this jury that he was under great emotional distress. Now, I don't know what great emotional distress is. And that's up to the jury to decide that. I'm not going to tell this jury that I

think he was under such great emotion stress that it's one of the mitigating factors. I do think that his childhood – I go on record saying that his childhood – we think that that is a mitigating circumstance. Now, how much it affected him the doctors disagree. That's up for the jury to decide. As I told you, psychiatry is an imperfect – imperfect science. So that's up to you to decide.

* * *

[1645] him. I suggest to you that this case is a case which this jury has the mitigating circumstances to give him the death penalty. There's no question – there's no – it's there, but you – it's your decision. Now, not to give him the death penalty I meant to say. Not to give him – I'm worried about the death penalty. I don't want you to kill this boy because I think – I think the evidence shows that he can be helped. I think the doctors said that. He can be helped. And he's young enough and he's led a lousy childhood. And for us to kill him is – is – well –

You know death is the absolute punishment. Absolute. That's the absolute punishment you can give somebody – that I – that we have. But it's not proper in a case when a person is not absolutely responsible. Have you ever thought about that? It's the absolute punishment. But is death in the electric chair proper for somebody who is not [1646] absolutely responsible? And do you think that Doug Buchanan was absolutely responsible? Does this evidence show you that he was not absolutely responsible? Death is not – it's the absolute punishment. And it's not the proper punishment for a person who's not absolutely responsible and absolutely responsible for what he did.

* * *

[1647] I want to tell you something. The existence of a single mitigating circumstance – if you don't believe but there is one mitigating circumstance, you can find that this boy – this boy should have a life sentence. That's all you have to have. The Commonwealth – if you [1648] will notice that the Commonwealth – if you can believe that this mitigation is enough to spare his life, you can do it. The Commonwealth has to prove all of their things in the instruction that all this was heinous and all, but if you believe that Doug had one mitigating thing, you can – you can spare his life.

* * *

[1649] you don't know about the case. And you – if they come to you and say why didn't you kill him, I read in the paper about all that stuff, you can tell them you did not hear the evidence. I heard the evidence. You don't know what you are talking about. There was mitigation.

* * *

[1650] And I don't want you to be misdirected or misled about this concept of mitigation. Mitigation is a balancing proposition. It is not a directory type of proposition. If the only question was is there mitigation, we could have stopped back on Thursday night. [1651] Even Dr. Lee and Dr. Gwaltney says yes, there is some mitigating circumstances. So don't be misled. This is not a proposition that if you find that there is some mitigation in it, that he had a crummy childhood, that he had parents who were not the best of parents, that he had a family situation that was not the best of family situations, that

doesn't mean you have to come back in here with less than the maximum penalty. You've got to balance it. You've got to balance it.

And I suggest just a simple proposition of logic to you. As the body count goes up, does the mitigation have to go up? There's nothing in the law on that. That is a simple proposition of logic. How high do you have to stack the bodies and how high does the mitigation have to rise?

* * *

[1652] Now, Mr. Poindexter attacks the statements and he says that they showed that he was under extreme emotional disturbance or distress and that's a mitigating circumstance. Remember Dr. Gwaltney's testimony this morning? Dr. Gwaltney says that there are relevant factors in mitigation concerning his history and character that the trier of fact – that's you folks – may find relative at sentencing issues. But he goes on to say there is no indication that at the time of the offenses, his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired.

* * *

[1653] Dr. Gwaltney also says he also did not appear to have acted under extreme mental or emotional disturbance at the time of the offense. Does that mean that Dr. Gwaltney and Dr. Lee say no, he wasn't hyped up? No, that's not what they said at all. Dr. Gwaltney said he naturally reports varying degrees in emotional arousal

under the relevant time – during the relevant time. However, he was not acting under extreme mental or emotional disturbance. His behavior appears to have been based on reasoning that led to purposeful goal directed behavior to achieve its end. Those are some very complicated concepts of words. What does it all mean?

You remember Dr. Brown's testimony yesterday, the psychologist and the psychiatrists that were working with him? He [1654] used the same language. Maybe some of you understand psychological jargon. But I asked him a simple question. I said when you are describing what was going – the state he was in when this was going on, I said, are you familiar what it's like when a troop is ordered into combat, going to a killing situation? Is it like that? He said, yes. That's what it's like.

Well, I am not going to sit here and argue to you that Douglas McArthur Buchanan, Jr. wasn't hyped up, wasn't emotionally aroused when he was about the act of killing someone. That would make him – even could make the situation even worse than it is. How could anybody – even someone who has killed four persons – go in and kill four people and not have some emotional response? That would be totally absurd.

But does that mitigate it? Does because you get hyped up because you are doing something wrong, does that excuse it? That's what they are suggesting.

* * *

[1656] Ladies and gentlemen, one thing that probably Mr. Poindexter and I agree about is this, and that is, that what you have to do, you have to balance. If you believe the crime was vile, I am not going to sit here and [1657] suggest to you that you must bring back a sentence of death. That is not the law. You are entitled to follow your own caprice. You are entitled to consider all of the facts, the history, the mitigating circumstances, and all of those things. But what I do suggest to you is this. I suggest again that you must bring back a sentence of death in this case because it is the only – it is the only reasonable sentence that can be given for acts such as this.

* * *

[1658] Listen down where you know what is right. Tell me, which of these makes more sense? Are you going to walk back into this courtroom and are you going to say, we the jury on the issue joined, having found the defendant guilty of capital murder by having willfully, deliberately, and with premeditation killed Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan, and Geraldine Patterson Buchanan as a part of the same transaction, and having found unanimously that his conduct in committing the murders of the four victims, or any of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the four victims, or to any one of them, and having considered the evidence in mitigation of the offense, are you going to come back and say, we fix his punishment at life imprisonment? And that is less than the [1659] maximum.

I do not try to appeal to your emotions whatsoever. I do appeal and urge you to use your sense of justice, your sense of duty, and your sense of fair play. You must be fair to the people of this county and to this defendant and nobody knows more. With all the humility in the world, I ask you to bring back the maximum sentence of death.

THE COURT: Members of the jury, look this way just a minute, please. Here are your verdict forms. As you know, you have the two options. If you find that his sentence should be death, then your foreman, whom you elect, signs the bottom line here on the first form. If you find that the punishment should be life imprisonment, then your foreman signs the second form.

Now, we are going to send with you the verdict forms, these two instructions, and all of the exhibits in the case. Retire to your room now and consider your duties. And when you get through, knock on the door and we'll be here waiting for you.

VIRGINIA:

IN THE CIRCUIT COURT OF
THE COUNTY OF AMHERST

INSTRUCTION NO: 1-P

You have convicted the defendant of an offense which may be punishable by death. You must decide whether the defendant should be sentenced to death or to life imprisonment.

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment.

If the Commonwealth has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then you shall fix the punishment of the Defendant at life imprisonment.

Given
/s/ RCG

INSTRUCTION NO: 2P

In order to return a sentence of death, all twelve jurors must unanimously agree on that sentence.

Given
/s/ RCG

Instruction AB

In addition to the mitigating factors specified in other instructions, you shall consider the circumstances surrounding the offense, the history and background of Douglas McArthur Buchanan, Jr., and any other facts in mitigation of the offense. If you find the existence of any facts which mitigate against the death penalty, then you shall consider those facts in deciding whether to impose a sentence of death or life imprisonment.

Refused
/s/ RCG

Instruction AC

In order to return a sentence of death, all twelve jurors must unanimously agree on that sentence. If any juror does not believe the sentence of death is warranted under these instructions, then a sentence of life imprisonment shall be imposed.

Refused
/s/ RCG

Instruction AG

If you find that Douglas McArthur Buchanan, Jr. has no significant history of prior criminal activity, then that is a fact which mitigates against imposing the death penalty, and you shall consider that fact in deciding whether to impose a sentence of death or life imprisonment.

Refused
/s/ RCG

Instruction AH

If you find that the capital felony was committed while Douglas McArthur Buchanan, Jr. was under the influence of extreme mental or emotional disturbance, then that is a fact which mitigates against imposing the death penalty, and you shall consider that fact in deciding whether to impose a sentence of death or life imprisonment.

Refused
/s/ RCG

Instruction AI

If you find that at the time of the commission of the capital felony, the capacity of Douglas McArthur Buchanan, Jr. to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, then that is a fact which mitigates against imposing the death penalty, and you shall

consider that fact in deciding whether to impose a sentence of death or life imprisonment.

Refused
/s/ RCG

Instruction AJ

The age of Douglas McArthur Buchanan, Jr. at the time of the commission of the capital offense is a fact which mitigates against imposing the death penalty, and you shall consider that fact in deciding whether to impose a sentence of death or life imprisonment.

Refused
/s/ RCG

VIRGINIA:

IN THE CIRCUIT COURT OF
THE COUNTY OF AMHERST

COMMONWEALTH,

Plaintiff

v. VERDICT OF JURY

DOUGLAS MCARTHUR BUCHANAN, JR.,

Defendant

We, the Jury, on the issue joined, having found the defendant guilty of capital murder by having willfully, deliberately, and with premeditation killed Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan as part of the same transaction and having found unanimously that his conduct in committing the murders of the above four victims, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them, and having considered the evidence in mitigation of the offense, we unanimously fix his punishment at death.

Signed Myra J Ramsey
Foreman

OR

We, the Jury, on the issue joined, having found the defendant guilty of capital murder by having willfully, deliberately and with premeditation killed more than one

person, namely, Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan as a part of same transaction and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed _____
Foreman

SUPREME COURT OF VIRGINIA
DOUGLAS MCARTHUR BUCHANAN, JR.

V.

COMMONWEALTH OF VIRGINIA

Record Nos. 890107 and 890108

September 22, 1989

* * *

I. FACTS

The murders occurred in a two-hour time period between 3:30 p.m. and 5:30 p.m. on September 15, 1987. On that day, Buchanan and his wife, Christianne, drove to a spot on the Blue Ridge Parkway which was a ten-minute walk through the woods to Buchanan, Sr.'s home. They discussed the contemplated murders. Indeed, they had discussed the murders the previous day and had driven to Buchanan, Sr.'s home, but defendant decided, at that time, that he could not follow through with the plan to kill his family. On September 15, however, Buchanan left his wife, in their parked vehicle and, carrying a pair of rubber gloves and his .22-caliber rifle, walked through the woods to his father's house.

Buchanan found his father outdoors behind the house. He explained his having the rifle by telling his father that he had been squirrel hunting. The two went inside where they engaged in conversation. They had a disagreement because Buchanan, Sr. made disparaging remarks about his first wife, defendant's deceased natural mother. Buchanan, Sr. charged that his present wife was unfaithful and that defendant's mother had been no better. Buchanan disputed the assertions about his mother.

Buchanan, Sr. broke off the conversation and invited Buchanan outside to look at a recently purchased automobile. As Buchanan, Sr. walked towards the door, Buchanan placed the rifle to the back of his head and shot him. Buchanan, Sr. fell to the floor. Buchanan then placed the rifle to his father's forehead and shot him between the eyes. Next, Buchanan dragged his father's body into the master bedroom. He reached under his father's mattress and removed a .22-caliber pistol.

Fifteen minutes later, Buchanan heard his brothers arriving from school. He stood waiting behind the living room door, rifle in hand. Donnie, who was ten years old, came in first and walked past Buchanan who shot him in the back of the head. Buchanan then placed the rifle to Donnie's face and shot him near the right temple.

J.J., who was thirteen years old, heard the shots and started to run. Buchanan went outside to the porch and shot J.J. twice as he ran. He then helped J.J. walk inside the house where he shot him a third time, this time in the left side of the forehead. Buchanan dragged the bodies of both boys from the living room. J.J., however, despite his wounds, got up and walked back into the living room. Buchanan obtained a knife from the kitchen and stabbed J.J. five times. One stab wound pierced the skull and superficially penetrated the brain; another wound severed the carotid artery.

Buchanan waited inside the house until Mrs. Buchanan returned home. As she entered the house, he hid behind the front door. Once she was inside, he confronted her with the pistol aimed at her head. He pulled the trigger once, but the pistol did not fire. On his second

attempt, the pistol fired; the bullet grazed the side of Mrs. Buchanan's head; she fell to her knees. He then took the knife he had used to kill J.J. and stabbed Mrs. Buchanan repeatedly. He stabbed her four times in her upper right chest. He slashed her throat from side to side, down to her vertebra column, severing the windpipe and all major veins and arteries in her neck. She also sustained defensive wounds to her hands.

Buchanan ran from the house through the woods to his parked vehicle. Along the way, he tossed his bloody tennis shoes and the knife into a dumpster. As his wife drove him away, he tossed the rifle out of the window.

* * *

Buchanan's descriptions of what transpired just prior to his father's murder were as follows: In his first confession, he stated that he and his father were inside the house talking but his father did not ask how Buchanan and his wife were doing. Buchanan said this omission "was really making [him] mad." He stated that he and his father started arguing but he immediately explained without any prodding from the examiners that: "I mean it wasn't – I mean it wasn't a heated argument." Buchanan continued: "all right – then he started to walk out the door and I shot him" Buchanan's interviewer asked him to explain exactly what happened. Buchanan replied, "[h]e turned around instead of walking out the door and I shot him from behind." Asked what happened next, Buchanan answered: "And then he fell to the ground and I shot him again."

Buchanan was then asked specifically whether he and his father were arguing at the time Buchanan, Sr. was

killed; Buchanan said no: "See we weren't arguing at the time. What he was doing was gonna show me his blue Nova [automobile], cause I hadn't seen it before." The interviewer asked what lead up to the murders; Buchanan replied: "They never treated me like a son – they treated me like an outsider all the time, I mean – I don't think they cared." Again Buchanan was asked whether it was any particular thing that "set it off at this particular time." He replied: "there was no one thing that they could of done that – would have done that, it's just that I mean, they never talked to me when I was living there."

In his second confession, Buchanan stated that he and his father were inside the house talking "and started arguing – not really arguing but just, you know, just disagreeing, mostly. And just hassling – it's been going on between us and things like that. Then uh he wanted to talk and showed me the – the newest Nova that he had." Buchanan stated further that: "And uh and then I shot him then – before he went out the door." When asked where he shot his father, Buchanan replied: "From the back – and in the back of the head." Then Buchanan shot his father again, this time in the face.

At trial, on direct examination, Buchanan said that he and his father were inside the house talking when his father said that Mrs. Buchanan was cheating on him. Buchanan suggested that his father get a divorce. His father replied that "it would have been the same way if [Buchanan's] . . . real mother was alive." Buchanan testified that as his father talked, *his father* was getting "pretty mad" at Buchanan. Buchanan's counsel asked him how he felt when his father said his deceased natural mother

would have been unfaithful; Buchanan responded: "I was getting mad. I was sweating. I was getting real hot and I was shaking." When Buchanan tried to defend his natural mother, his father broke off the conversation saying, "that's it, let's go out and look at this car I bought for J.J." These questions and answers followed:

Q. And then what happened?

A. Then he started to walk out the door and I shot him.

Q. Why did you do it?

A. I don't know, I was just mad. I just was – I don't know really why I did it. I didn't mean to. It just happened.

Q. Well, what happened after you shot him?

A. I just kind of stared at him for a minute – I don't know – I didn't know – I was scared – I didn't know what to do. And then I shot him again.

On cross-examination, Buchanan testified that the argument with his father had not been heated: "It wasn't really heated. It's just that he yelled at me a couple of times." "It was no stand up arguing or pushing or anything like that." "[W]e were both getting mad, but we were not pushing or fighting." Buchanan also admitted that his father tried to call off the disagreement by suggesting that he and his son go outside to look at a car. Buchanan further admitted that when he pulled the trigger he intended to kill his father.

[24] We are of opinion that Buchanan was not entitled to a second degree murder instruction regarding his

father's murder. This murder was planned. The only reason it was not carried out the day before was because Buchanan made a conscious decision not to do it at that time. But, the next day, he returned to his father's house prepared to kill and intending to kill.

* * *

[35] Buchanan submits that it was error to list the statutory aggravating factors for the jury while refusing to list the mitigating factors mentioned in the statute. Even in advancing this argument, Buchanan admits that it is contrary to *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985), *cert. denied*, 475 U.S. 1099 (1986). Yet he asks us to reconsider *Watkins*. We decline the invitation. The rule that the mitigating factors mentioned in the statute must not be listed is intended to benefit the defendant. If the factors suggested in the statute were listed, the jury could be misled into concluding that those were the only factors it could consider in mitigation. But the intent of the statute is to leave the jury free to consider, in mitigation, whatever the jury deems appropriate. *Watkins*, 229 Va. at 491, 331 S.E.2d at 438; *Clark*, 220 Va. at 212, 257 S.E.2d at 790.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

DOUGLAS MCARTHUR BUCHANAN,	)	
Petitioner,	)	**Civil Action No. 93-0306-R**
v.	)	**ORDER**
EDWARD W. MURRAY, DIRECTOR, VIRGINIA DEP'T OF CORRECTIONS AND THE COMMONWEALTH OF VIRGINIA,	)	(Filed Jan. 25, 1996)
Respondents.	)	**By: Hon. James C. Turk United States District Judge**

In accordance with the written memorandum opinion entered this day, it is hereby

ADJUDGED AND ORDERED

(1) that respondent's motion to dismiss the above referenced petition for writ of *habeas corpus*, pursuant to 28 U.S.C. §2254, shall be and hereby is **GRANTED**;

(2) that the petition for *habeas* relief shall be and hereby is **DENIED**;

(3) that petitioner's motion for discovery shall be and hereby is **DENIED**; and

(4) that this action is stricken from the active docket of this court.

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to all counsel of record.

ENTER: This 25th day of January, 1996.

/s/ James C. Turk
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

DOUGLAS McARTHUR BUCHANAN, **Petitioner,** **v.** **EDWARD W. MURRAY, DIRECTOR, VIRGINIA DEPT. OF CORRECTIONS, AND THE COMMONWEALTH OF VIRGINIA,** **Respondents.**	**Civil Action No. 93-0306-R** **MEMORANDUM OPINION** (Filed Jan. 25, 1996) **By: Hon. James C. Turk United States District Judge**

DOUGLAS McARTHUR BUCHANAN brings this action as a petition for writ of *habeas corpus*, pursuant to 28 U.S.C. §2254. He states that he is confined by respondents under a sentence of death at the Mecklenburg Correctional Center, located in Boydton, Virginia. He claims that his confinement is in violation of the Constitution of the United States for the reasons set forth herein. Respondent has filed a motion to dismiss the §2254 petition as meritless, to which petitioner submitted a memorandum in opposition. Respondent then submitted a reply to petitioner's memorandum, to which petitioner again filed a memorandum in opposition. The court has also received the complete trial, appellate and post-conviction record of petitioner's case. After review of the record and the pleadings submitted by the parties, the court finds no

material issues of fact to be in dispute and, thus, determines that no evidentiary hearing is necessary to evaluate the merits of petitioner's *habeas* claims. Furthermore, in accordance with the following, it is the opinion of the court that the motion to dismiss must be granted and that the petition for *habeas corpus* must be denied.

I. FACTS

Petitioner Douglas McArthur Buchanan, Jr., was convicted by a jury in the Circuit Court for Amherst County, Virginia, for killing his father, Douglas Buchanan, Sr.; his stepmother, Geraldine Buchanan; and his two stepbrothers, Donnie and J.J. Buchanan on September 15, 1987. Buchanan was nineteen years old at the time of the killings. Although he confessed to performing the killings, he asserts his wife, Christianne, two years his senior, was the driving force behind the murders. She has also confessed to her participation in planning and preparing for the killings.

Family history seems to have played some part in the killings. Buchanan's natural mother died after a long illness when he was nine. Six months later, his father married Geraldine, a first cousin of Mrs. Buchanan. When he was a young child and then while his mother was sick, Buchanan often stayed with her parents and other relatives on her side of the family. About a year after his mother's death, however, some sort of family feud arose between his parents (his father and Geraldine) and his natural mother's relatives. Buchanan was punished if he waved or talked to them, even though they lived close by. Geraldine removed or burned all the pictures of his

mother that she could find, saying she wanted to be his only mother. His parents also forbade him from visiting his mother's grave. He had other disagreements with his parents over chores and extracurricular activities. He ran away on several occasions and joined the National Guard before finishing high school.

On December 8, 1986, Buchanan married Christianne secretly. After his parents discovered the marriage, the couple lived in Buchanan's bedroom in his parents' home for several months. Later, his parents helped the young couple get their own housing. In June, 1987, Buchanan had an emergency appendectomy. While he was in the hospital, Christianne invited his mother's relatives to visit him, angering Buchanan's father and Geraldine. Buchanan testified that he and Christianne did not speak to his parents from June until September.

On September 14, 1987, Buchanan and Christianne talked about killing his parents.[1] The two of them even drove to the Buchanan home that evening, but Buchanan decided not to kill anyone that night and they left. The next day, September 15, Buchanan missed work. He and Christianne drove to the Blue Ridge Parkway and had a picnic at a spot within several minutes walk of the Buchanan home. Sometime around 3:00 in the afternoon, Buchanan walked from the picnic spot to his father's

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[1] According to Buchanan's testimony, Chris told him that the only way to solve his family problems was to kill the family. Buchanan asserts that Christianne was highly unstable and that she resented Geraldine, perceiving her as competition for his affection. She was dismissed from the Air Force on psychiatric grounds shortly after she and Buchanan married.

house. He carried a .22 caliber rifle and a pair of rubber gloves. He found his father in the yard and told him that he had been squirrel hunting. They went inside and talked for awhile without incident, but then the conversation turned to an old disagreement over the supposed infidelity of Buchanan's natural mother. The discussion angered them both, and there was considerable yelling. Even so, Buchanan told police that it was not a heated argument.

The father changed the subject and asked Buchanan to come outside to see a car he had recently purchased for J.J., Buchanan's thirteen-year-old stepbrother.[2] As his father walked toward the door, Buchanan shot him in the back of the head. The father fell. Buchanan then placed the nose of the rifle against his father's forehead and fired again. Buchanan dragged the body to the master bedroom and put a towel over the face. He got a .22 caliber pistol from under a mattress and took it with him back to the living room.[3]

About fifteen minutes later, Buchanan heard Donnie and J.J. arriving home from school. Holding the rifle, he hid behind the door. As Donnie, age ten, walked in the door past Buchanan, Buchanan shot him in the back of

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[2] Buchanan testified that this remark angered and hurt him because he had not been allowed to get a driver's license until he was eighteen, and he had never been given a car.

[3] Buchanan testified at trial that he thought about killing himself at this point and that he was about to leave the house when his stepbrothers came home.

the head[4] and then in the face near his right temple. J.J. heard the shots and ran back out into the yard where Buchanan shot and wounded him in the back. Buchanan promised to call for help and coaxed J.J. to come back into the house where Buchanan shot him a second time, in the head. Buchanan pulled the boys' bodies out of the living room, but J.J. was still alive. He got up and walked back into the living room. Buchanan got a knife from the kitchen and stabbed the boy numerous times in the head, back and neck, severing his carotid artery.

Buchanan testified that he had blamed Geraldine, his stepmother, for all the family problems, since they started with her marriage to his father. He stated that on September 15, he went to the house intending to talk to her, expecting that she would be home alone.[5] After killing his father and the boys and moving their bodies, Buchanan testified, he grew very angry at Geraldine and determined to kill her also. He spread a blanket over the bloodstains in the living room and waited for her to come home. When he heard her arrive, he hid behind the door. As she stood in the living room, he fired at her, but the

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[4] Buchanan testified that he did not intend to shoot, that the rifle just went off. He said that he had never planned to kill the boys, but testified that "it just happened" and that he went "crazy" after killing his father.

[5] He testified that he took the gun to the house for protection, as Geraldine had once drawn a gun to break up a fight between Buchanan and his father. He remembered that Geraldine usually tried to be home by 3:00 in the afternoon on weekdays, before the boys got home from school, but she had recently started a new session of classes at Sweetbriar College and was working part time.

gun did not function. He fired again, and the bullet grazed her head. She fell to her knees. Buchanan stabbed her repeatedly with the kitchen knife in the neck, skull and chest. Her neck was severed to the spine, and she had knife wounds in her hands as though she had tried to defend herself.[6]

Taking the knife and the rifle, Buchanan fled from the house and walked through the woods back to the Parkway where Christianne was waiting in their truck. She drove and helped him dispose of his bloody tennis shoes, the knife and the rifle. Buchanan and Christianne fled to New Mexico where they were ultimately apprehended and confessed to the murders.

II. PROCEDURAL HISTORY

On October 6, 1987, Buchanan was indicted by a Grand Jury of Amherst County, Virginia, for four capital murders and four counts of use of a firearm in the commission of a murder.[7] Three of these initial capital murder indictments were later quashed. The Grand Jury then issued two additional capital murder indictments of two counts each and separate indictments bringing four counts of first degree murder. Buchanan objected to the additional capital murder indictments as vague and

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[6] Buchanan denies that she struggled.

[7] As now numbered, Va. Code Ann. §18.2-31(7), the Virginia death penalty statute, provides that a person may be charged with capital murder for "[t]he willful, deliberate, and premeditated killing of more than one person as part of the same transaction."

redundant.[8] In February, 1988, the Circuit Court for Amherst County denied Buchanan's motion for a change of venue. In April, the court denied petitioner's motions for additional peremptory challenges, his motion to sequester the jury, and his renewed motion for change of venue. On April 25, 1988, Buchanan pled not guilty to all charges.

The Amherst Circuit Court conducted a jury trial April 26-28, 1988. The jury convicted Buchanan of at least one charge of capital murder, four counts of first degree murder, and four counts of use of a firearm in the commission of a murder. After a separate sentencing hearing on April 29 and 30, 1988, the jury sentenced Buchanan to death on the capital murder conviction, to life imprisonment on each of the four first degree murder charges, to two years on one of the firearms charges, and to four years on each of the three remaining firearms charges. On August 19, 1988, after reviewing the state probation officer's post-sentence report and denying petitioner's requests for additional neurological testing, the court overruled petitioner's motion to set aside the verdict of the jury and imposed the jury's recommended sentences.

On September 22, 1989, the Supreme Court of Virginia set aside the first degree murder conviction for the killing of Buchanan's father, and affirmed the capital murder conviction, the remaining three first degree murder convictions, and the firearms convictions. *Buchanan v. Commonwealth*, 384 S.E.2d 757 (Va. 1989), *cert. denied*, 493

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[8] The specific posture of the indictments in Buchanan's case will be discussed in greater detail, *infra*, in conjunction with the court's analysis of his claims involving the indictments.

U.S. 1063 (1990) [hereinafter *Buchanan*]. By order dated January 22, 1990, the United States Supreme Court denied a petition for writ of certiorari. *Buchanan v. Virginia*, 493 U.S. 1063 (1990).

In June, 1990, Buchanan filed a petition for writ of *habeas corpus* in the Circuit Court of Amherst County, Virginia; he subsequently amended the petition in September, 1990. The Circuit Court, by order dated August 15, 1991, dismissed all of petitioner's claims except one allegation of ineffective assistance of counsel. On September 24, 1990, the Circuit Court conducted an evidentiary hearing on this sole remaining allegation, but issued a final order dismissing all of Buchanan's *habeas* claims on December 19, 1991. Buchanan filed a petition for appeal of this dismissal to the Virginia Supreme Court. By unpublished order dated June 25, 1992, the Virginia Supreme Court denied the petition. Buchanan then filed a timely petition for writ of certiorari to the United States Supreme Court which was denied. *Buchanan v. Murray*, 113 S.Ct. 501 (1992).

III. PETITIONER'S CLAIMS

I. During the penalty phase of trial, the court placed an unconstitutional restriction upon Buchanan's presentation of mitigation evidence. Specifically, citing the rule against hearsay testimony, the court refused to let Buchanan's expert witness testify in any respect to statements he had received which were not actually presented by trial witnesses.

II. The penalty phase instructions to the jury were constitutionally deficient because they failed to

instruct the jury sufficiently as to mitigation and as to the aggravating circumstance of "vileness."

A. The court refused to instruct the jury as to the meaning and purpose of mitigation evidence and improperly misled the jury by instructing that mitigation evidence be considered in mitigation "of the offense" instead of clearly instructing the jury to consider all mitigation evidence, even that which did not excuse Buchanan's conduct.

B. The court refused to instruct the jury that unanimity required for findings of aggravating factors was not necessary for mitigating factors.

C. The court and the Virginia capital sentencing scheme did not provide Buchanan's jury with a constitutionally adequate instruction regarding the definition of the aggravating factor of "vileness."

D. The totality of the instructions to the jury at the penalty phase of Buchanan's trial was inadequate.

III. Virginia's capital punishment statute, as interpreted by the Virginia Supreme Court, and as applied in this case, is unconstitutional.

A. Virginia's "vileness" aggravator is unconstitutionally vague, as was the construction of that aggravator in Buchanan's case.

B. Mitigating circumstances have been effectively removed from Virginia's capital sentencing scheme, as they were in Buchanan's case.

C. Virginia's statutory verdict form mandates a sentence of death, as did the verdict form in

Buchanan's case, because the form fails to provide a vehicle by which the jury can give effect to mitigating evidence and still sentence a defendant to life imprisonment once that jury finds an aggravating factor.

D. Virginia does not provide meaningful appellate review and did not in Buchanan's case.

E. Virginia's sentencing scheme as a whole, generally, and as applied to Buchanan, is constitutionally deficient.

IV. The court unconstitutionally refused to instruct the jury (and send the case to the jury) as to the lesser included offense of second degree murder.

V. During the guilt phase, the court unconstitutionally failed to instruct the jury as to the meaning of the term "transaction" under Virginia Code §18.2-31(g).

VI. Virginia Code §18.2-31(g) is unconstitutionally vague because it fails to define the word "transaction."

VII. Buchanan was denied due process, assistance of counsel and the right to present evidence by the vague and inappropriate framing of the indictments.

A. Buchanan was not adequately informed of what the Commonwealth intended to prove or against which "transaction" he had to defend.

B. The trial court unconstitutionally limited opening statement of defense counsel by refusing to allow any discussion of the number of indictments.

VIII. The trial court unconstitutionally denied Buchanan's motion for change of venue.

A. Pretrial publicity about the crimes and the trial of Buchanan's wife so tainted the local jury pool that a change of venue should have been granted.

B. Pretrial publicity which included wholly false accounts that the killings were committed for financial gain so tainted the local jury pool that a change of venue should have been granted.

IX. The trial court committed constitutional errors during jury *voir dire*.

A. The trial court refused to let defense counsel ask about jurors if each believed that a death sentence is the only appropriate sentence for capital murder.

B. The trial court refused to allow Buchanan's counsel to ask non-conclusive, open-ended questions of jurors to explore their pre-existing attitudes about the case resulting from exposure to pretrial publicity.

C. The trial court immediately dismissed any juror who indicated an initial reluctance to impose the death penalty without giving defense counsel opportunity to rehabilitate such jurors by exploring the issue further with them.

X. The trial court made constitutional errors regarding selection and sequestration of the jury.

A. The trial court failed to sequester the jury.

B. The trial court failed to grant additional peremptory challenges during jury selection.

XI. Imposition of the death penalty constitutes cruel and unusual punishment.

XII. Buchanan was denied effective assistance of counsel.

A. Counsel failed to advise Buchanan that he could and should plead guilty to the first degree murder indictments in order to avoid the death penalty indictments on grounds of double jeopardy.

B. Counsel failed to object to the penalty phase jury instruction regarding "vileness" or to submit their own instruction providing a constitutionally adequate vileness.

C. Counsel failed to move for the trial judge to recuse himself from presiding over Buchanan's trial even after the judge was quoted in the newspaper four days before trial as stating that he believed Christianne Buchanan to be guilty of first degree murder; counsel intended to seek an instruction for second degree murder and the judge's comment before trial should have warned them that he would not grant such an instruction, as indeed he did not.

D. Counsel prejudiced Buchanan's position on appeal by stating that some jurors were "acceptable" to Buchanan after the court had overruled counsel's objections to those jurors.

E. Counsel stated publicly, prior to trial, that Buchanan was guilty either of capital murder or of first degree murder.

F. Counsel failed to object to the Commonwealth's Attorney prosecuting Buchanan although he had represented Buchanan's grandparents in 1984 in a suit seeking visitation with Buchanan and had further represented Buchanan himself as a juvenile.

G. Counsel made evidentiary errors.

1. Counsel failed to move for a mistrial in the penalty phase when it became known that an expert witness from Central State Hospital had tape recorded an interview with Buchanan; in addition, counsel failed to request a copy of the tape for possible use in mitigation.

2. Counsel failed to preserve their objection to the trial court's order requiring submission of the report of defense psychiatrist Dr. Brown to the Commonwealth's expert witness and failed to demand simultaneous exchange with the report of the Commonwealth's expert witness.

H. Counsel failed to obtain the written guilt phase verdict for study prior to the penalty phase and so was not in a position to object effectively to the verdict on the form as logically inconsistent.

XIII. Other constitutional violations:

A. The trial court denied additional neurological testing, thus denying Buchanan possible mitigation evidence related to his head injury.

B. The trial court refused to instruct the jury that if Buchanan was sentenced to life, he would not be eligible for parole, if at all, for a very long time.

C. The trial court refused to permit the jury to hear a preliminary statement proffered by Buchanan's counsel, explaining the *voir dire* process.

D. Commonwealth experts who obtained statements from Buchanan at Central State Hospital failed to advise Buchanan of his constitutional rights.

E. Buchanan was denied access to tape recordings made of interviews of Buchanan at Central State Hospital.

IV. OPINION OF THE COURT

A. Exhaustion and Procedural Bar

In reviewing the record, the court finds several of Buchanan's claims to be barred from federal *habeas* review under the doctrines of exhaustion and procedural default. A federal court may not grant a petition for writ of *habeas corpus*, pursuant to §2254, unless petitioner has exhausted the remedies available in the courts of the state which convicted him. §2254(b). To exhaust his state court remedies, a death penalty defendant in Virginia must present his claims to the Virginia Supreme Court, through one of the following methods. First, he appeals the conviction and sentence directly to the Virginia Supreme Court. Va. Code Ann. §17-116.05:1(B). Second, he can file a state *habeas* petition with the circuit court where he was convicted, with appeal of an adverse decision to the Virginia Supreme Court. Va. Code Ann. §8.01-654; §17-116.05:1(B). Finally, he can exhaust his remedies by filing a state *habeas* petition directly with the Virginia Supreme Court. Va. Code Ann. § 17-97. Buchanan has exhausted his state court remedies as to most of his claims by presenting them to the Virginia Supreme Court, either on direct appeal or in his state *habeas* petition and appeal therefrom or both.

Federal review of fully exhausted claims may be barred because petitioner has defaulted some state procedural rule. Where petitioner has failed to comply with a state procedural rule and the state supreme court has expressly relied on that procedural default as an adequate and independent state law ground for denying relief on a claim, federal review of that claim is normally barred. *See Harris v. Reed*, 489 U.S. 255, 262 (1989) and *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). A federal court may review defaulted claims only if petitioner excuses his default through a showing of cause for the default and resulting prejudice or a showing of actual innocence. *Harris*, 489 U.S. at 262.

On direct appeal, the Virginia Supreme Court found several of Buchanan's claims barred under Virginia's contemporaneous objection rules. In its order denying Buchanan's appeal from the circuit court's denial of his state *habeas* petition, the Virginia Supreme Court found several claims, or parts of them, to be barred by the rule of *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974), *cert. denied*, 419 U.S. 1108 (1975).[9] Under the *Slayton* rule, claims which should have been raised at trial and/or on direct appeal, but were not raised at the proper time, cannot constitute grounds for state *habeas* relief. *Id.* Unless Buchanan can excuse his defaults of these claims,

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[9] Analysis of exhaustion and procedural default in this case is complicated by the fact that the claims were numbered differently in state and federal proceedings, despite the fact that present counsel also represented petitioner in the state *habeas* proceedings.

the court is barred from review of the merits even though the claims are exhausted. *Harris*, 489 U.S. at 262.

Ordinarily, in order to give state courts the opportunity to pass on the constitutionality of their criminal convictions and sentences, if a state *habeas* petitioner has not exhausted his available state remedies as to some of the claims raised in the federal petition, a federal court should dismiss the entire petition without prejudice to allow exhaustion of the claim before the state courts. *Rose v. Lundy*, 455 U.S. 509, 522 (1982). However, where a petitioner has not exhausted his state court remedies as to some claims, but has exhausted others, the federal court looks to applicable state law under which the state court would have ruled on the unexhausted claims; if it is clear that the state's procedural law would now bar state review of the unexhausted claims, should petitioner attempt to exhaust his state court remedies, the federal court need not dismiss the petition to require complete exhaustion. *Teague v. Lane*, 489 U.S. 288, 297-98 (1989); *Bassette v. Thompson*, 915 F.2d 932, 936-37 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991). Nevertheless, federal review of the claim is barred, based on petitioner's default of the state procedural rules, unless petitioner demonstrates cause and prejudice or actual innocence to excuse the default. *Teague*, at 298; *Bassette*, at 937.

Part or all of certain claims in Buchanan's federal *habeas* petition have not been presented to any state court. Although these claims are not exhausted as normally required under §2254, they are based on facts which Buchanan knew or reasonably should have known at the time he filed his state *habeas* petition. Accordingly, the Virginia Supreme Court would now find all of these

claims procedurally defaulted under Va. Code Ann. §8.01-654(B)(2). Under this statute, *habeas* relief cannot be granted in a later petition if petitioner knew or should reasonably have known all the facts necessary to those claims at the time he filed an earlier state petition. *Id.* Because the inevitable procedural default of Buchanan's unexhausted claims under §8.01-654(B)(2) serves as an adequate and independent state law ground on which the claims must be decided, this court need not dismiss the petition to allow exhaustion of these claims; nevertheless, the court is barred from review of the merits by the state procedural default, absent a valid excuse for the default. *See Teague*, 489 U.S. at 297-98; *Bassette*, 915 F.2d at 936-37. If Buchanan can demonstrate cause and prejudice for his procedural default of these claims, or show actual innocence, this court may address his unexhausted claims on the merits even though no state court has considered them.

As to several of these claims, Buchanan attempts to excuse his procedural default by arguing that ineffective assistance by his trial counsel caused the default by failing to raise the claim at trial. Ineffective assistance of counsel can constitute cause for a procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). However, petitioner must show that (1) the ineffective assistance itself was constitutionally significant, *Strickland v. Washington*, 466 U.S. 668, 687 (1984); (2) the ineffective assistance claim was presented to the state courts as required for exhaustion under §2254; and (3) the ineffective assistance claim itself has not been defaulted, *Murray*, at 488-89. *See also Justus v. Murray*, 897 F.2d 709, 713 (4th Cir. 1990). Under the principles of comity inherent in §2254,

the Virginia court must have a meaningful opportunity to consider the ineffective assistance claim before this court may address it, as a substantive claim or as cause to excuse procedural default of another substantive claim.

Petitioner also argues that he should be excused from exhausting several of his claims because raising the claims to the Virginia courts was or would now be futile, as the Virginia Supreme Court had addressed similar issues in earlier cases and ruled against petitioner's position. Buchanan further asserts that if futility excused him from exhausting the claim in the first place, then procedural default is not even an issue since default occurs during the exhaustion process. It is the opinion of the court that, under controlling precedent from the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit, this argument fails.

In rare cases, exhaustion of §2254 claims before the state courts may be excused by futility. (1) If the procedural rule under which the state court has found or would find default does not qualify as an independent and adequate state law ground upon which the claim must be decided and (2) exhaustion of the substantive claim before the state courts would be futile (because the state court has recently ruled decisively in a similar case against the legal theory supporting the claim), the federal court may reach the merits without dismissing the entire petition to require complete exhaustion, even if no state court has had opportunity to review the unexhausted claim. *See Adkins v. Bordenkircher*, 674 F.2d 279, 281 (4th Cir. 1982), *cert. denied*, 459 U.S. 853 and 459 U.S. 878 (1982). However, where a claim is clearly procedurally defaulted or would be procedurally defaulted if now

raised to state courts, futility offers no excuse for petitioner's exhaustion errors. *See id.; Engle v. Isaac*, 456 U.S. 107, 129 (1982).

In *Engle v. Isaac*, the United States Supreme Court reaffirmed previous holdings that "any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief." 456 U.S. at 129. Like Buchanan, Petitioner Isaac argued that he should be excused by the futility exception for failing to raise his claim properly to the state courts because state courts had already ruled decisively against similar legal arguments in an earlier case and would surely rule against his claim. The Supreme Court refused this excuse adamantly:

> We note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting *Sykes*.

Id. at 130. The court finds *Engle* and *Bordenkircher* to be consistent in holding that futility cannot excuse petitioner's failure to exhaust a *habeas* claim which is clearly procedurally defaulted, or would be procedurally defaulted if now presented to state courts, under a state

procedural rule which serves as an adequate and independent state law ground for disposition of the claim.

The claims which Buchanan attempts to excuse under the futility argument were either found by the Virginia Supreme Court to be procedurally barred under *Slayton*, 205 S.E.2d at 682, or Supreme Court Rule 5.25, or would now be barred under §8.01-654(B)(2), as Buchanan has already filed one state *habeas* petition. These Virginia default rules have been repeatedly held to qualify as adequate and independent state law grounds disposing of claims before a court may reach the merits. *See Bassette*, 915 F.2d at 936; *Whitley v. Bair*, 802 F.2d 1487, 1501 (4th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987); *Johnson v. Muncy*, 830 F.2d 508 (4th Cir. 1987). Based on the foregoing, it is the opinion of the court that Buchanan cannot rely on the futility doctrine to excuse either his failure to exhaust or his procedural default of any of his claims.[10]

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[10] Buchanan cites *Nix v. Whiteside*, 475 U.S. 157, 163 n. 3 (1986) as an indication that the United States Supreme Court still recognizes futility as an excuse for exhaustion of *habeas* claims. Footnote 3 in *Nix* recognized that the United States Court of Appeals for the Eighth Circuit and the district court had both found Petitioner Whiteside's *habeas* claim to be properly exhausted "since further proceedings would be futile." However, the Eighth Circuit based its refusal to require further exhaustion of Whiteside's ineffective assistance claim on two particular findings, unique to the facts of Whiteside's case: (1) the court found that further exhaustion of the claim would be futile because the state supreme court had "already determined that the state code of professional responsibility vindicated [petitioner's] counsel's actions and had in fact commended counsel for the 'high ethical manner' in which the matter had been handled"; and (2) as the ineffective assistance claim was so closely tied, factually and analytically, to federal due process and fair trial claims which Whiteside had already presented to the state court, the court found that the substance of petitioner's ineffective assistance claim had been presented to state courts sufficiently to satisfy §2254 exhaustion requirements as defined in *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (see additional discussion, *infra*). *Whiteside v. Scurr*, 744 F.2d 1323, 1326-27 (8th Cir. 1984). In essence, the Eighth Circuit determined, the state supreme court had already addressed both the factual and the legal aspects of the ineffective assistance claim; accordingly, the court reasoned, the claim was exhausted and not defaulted, allowing federal review of the merits. Buchanan's case does not equate with the unique posture of Whiteside's case, and the mere use of the word "futile" by the Supreme Court in *Nix* does not magically legitimize Buchanan's futility arguments in the face of *Engle* and *Bordenkircher*.

B. Analysis of Petitioner's Individual Claims

Claim I: During the penalty phase of trial, the court placed an unconstitutional restriction upon Buchanan's presentation of mitigation evidence. Specifically, citing the rule against hearsay testimony, the court refused to let Buchanan's expert witness testify in any respect to statements he had received which were not actually presented by trial witnesses.

Petitioner argues that his right to due process was violated when the trial court excluded testimony at the sentencing phase of the trial upon the basis of hearsay. During that phase of the trial, petitioner attempted to elicit testimony from his expert witness, Dr. Robert S. Brown, Sr., as to the content of statements made to him by other individuals during the course of interviews conducted for the purpose of discovering Buchanan's mental and emotional history. Petitioner offered this testimony to

provide factual support for Dr. Brown's expert opinion that the circumstances of petitioner's family history played a large role in his decision to kill certain members of his family. However, the Commonwealth objected to the admissibility of these out of court statements on hearsay grounds. The court sustained the objection but offered to allow Buchanan an opportunity to summon the declarants to testify as to their own statements. Counsel declined the offer and limited examination to questions directly addressing Dr. Brown's expert opinion.

Relying primarily on *Green v. Georgia*, 442 U.S. 95 (1979), petitioner maintains that the court should have permitted Dr. Brown to testify as to the statements on which he based his expert opinion. In *Green*, the Supreme Court held that a "mechanistic" application of state evidentiary rules at the sentencing phase of capital trial could rise to the level of a due process violation if there existed factors weighing against strict application of the rules. *Id.* at 97. Petitioner contends that, without the support of the interviewees' statements, Dr. Brown's opinions were robbed of any persuasive effect they might have had. Petitioner argues that, in view of this detrimental impact on Dr. Brown's expert opinion and the absence of any indicia of unreliability, the application of the hearsay rule to Dr. Brown's proffered testimony was so mechanistic as to rise to the level of a due process violation.

In response to these arguments, respondent refuses to acknowledge that the exclusion of testimony upon the basis of a state evidentiary rule could rise to the level of a due process claim. While such a position is clearly in conflict with *Green v. Georgia, supra*, the court must nevertheless agree that the application of the hearsay rule in

this particular instance does not rise to the level of a constitutional violation. In *Green*, the Supreme Court dealt with a situation in which a state court had excluded testimony at the sentencing phase of a criminal trial upon the basis of hearsay, even though it had admitted this same testimony at the guilt phase of a codefendant's trial. The testimony at issue involved an out of court statement proffered to show that the defendant had not been physically present when the victim had been killed by his codefendant. Consequently, the out of court statement bore upon a *precise* factual issue which was highly relevant to the defendant's culpability. Moreover, the proffered statement in *Green* had been uttered by the codefendant under circumstances in which there was no indication of ulterior motive, thus lending the statement a great deal of reliability. 442 U.S. at 97.

Although it cannot be denied that facts relayed by individuals who personally knew a capital defendant may also be highly relevant to whether the death penalty should be imposed, the statements in Buchanan's case were only offered to support an expert's opinion that was, in fact, presented to the jury. The statements at issue, therefore, would have born [sic] only indirectly on petitioner's character and culpability and, as such, would have been of somewhat limited probative value. Yet, there was no assurance of reliability other than petitioner's representations that the declarants had no reason to be untruthful given the purpose of Dr. Brown's interviews. Accordingly, the statements in this case were not only less probative, but also bore fewer indicia of reliability than did the statement in *Green*.

Furthermore, and perhaps even more importantly, the court gave Buchanan every opportunity to call those individuals whom he felt were essential to proving the existence of mitigating circumstances. He cannot now complain that the court erred by prohibiting the admission of hearsay when he had the option of introducing the direct testimony of the declarants themselves. If the testimony of these individuals was important to the demonstration of a mitigating factor, petitioner's counsel would clearly have taken the time to call those individuals into court. Indeed, even without the opportunity to quote statements made by the persons whom he had interviewed, Dr. Brown was able to provide a lengthy and detailed history of petitioner's mental and emotional history. Accordingly, the court must deny relief on Claim I of the petition.

Claim IIA: The court refused to instruct the jury as to the meaning and purpose of mitigation evidence and improperly misled the jury by instructing that mitigation evidence be considered in mitigation "of the offense" instead of clearly instructing the jury to consider all mitigation evidence, even that which did not excuse Buchanan's conduct.

Petitioner next contends that the jury instructions at the sentencing phase of the trial were inadequate to inform jurors of all the mitigating factors which they could consider in determining whether the death penalty should be imposed. However, a federal court should avoid attempting "to prescribe the particular form which state jury instructions on mitigation must take." *Briley v.*

Bass, 750 F.2d 1238, 1244 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985). In fact, in *Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991), *cert. denied*, 503 U.S. 973 (1992), the Court of Appeals for the Fourth Circuit reviewed jury instructions substantially similar to the instructions at Buchanan's trial and found that they satisfied the requirement for individualized sentencing under the Eighth and Fourteenth Amendments.[11] Specifically, the court in *Jones*

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[11] In *Jones*, the court gave the following instructions to the jury:

> If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt that the offense was outrageously or wantonly vile, horrible or inhuman, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.
>
> The Court instructs the Jury that even if you believe beyond a reasonable doubt that such facts and circumstances have been proven as to permit the Death Penalty, it is still the prerogative of the Jury to decide whether death should be the punishment or not, and the Jury is under no obligation or compulsion to find the punishment should be death.

947 F.2d at 1120.

In Buchanan's case, the trial court gave the following instructions to the jury:

> Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that [the Defendant's] conduct in committing the murders . . . was outrageously or wantonly vile, horrible or inhuman, in that it involved torture depravity of mind or aggravated battery to . . . the victims, or to anyone of them.

held that an instruction directing a jury to consider "all the evidence" was sufficient to assure that the jury would weigh both mitigating and aggravating factors. 947 F.2d at 1120. In reaching its conclusion that the instructions were constitutionally adequate, the Fourth Circuit also noted favorably that the statutory verdict form used at Jones' trial, which was identical to the one used at petitioner's trial, required the jury to recite that it had "considered the evidence in mitigation of the offense." *Id.* Accordingly, the court must deny relief on this ground.

Claim IIB: The court refused to instruct the jury that unanimity required for findings of aggravating factors was not necessary for mitigating factors.

The Virginia Supreme Court expressly held that this claim was procedurally barred from state *habeas* review under the rule of *Slayton v. Parrigan*. 205 S.E.2d at 682. Buchanan admits that he did not litigate this claim at trial. Although counsel submitted several proposed jury instructions regarding mitigation evidence, which the court refused, they did not request an instruction stating that the jury need not unanimously agree upon particular

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> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of the Defendant at death or *if you believe from all the evidence that the death penalty is not justified*, then you shall fix the punishment of the defendant at life imprisonment.

(emphasis added)

mitigating factors in order to find mitigation of the death sentence.

Buchanan argues that his undisputed procedural default of this claim at trial should be excused because counsel provided constitutionally ineffective assistance when they failed to propose a unanimity instruction. However, petitioner did not present this ineffective assistance argument to the Virginia courts during *habeas* proceedings and does not present any excuse here for his failure to do so. As an unexhausted and defaulted ineffective assistance claim cannot serve as cause to excuse any other procedural default, the court is barred under the doctrine of procedural default from reviewing the merits of Claim IIB. *See Justus*, 897 F.2d at 713.

Claim IIC: The court and the Virginia capital sentencing scheme did not provide Buchanan's jury with a constitutionally adequate instruction regarding the definition of the aggravating factor of "vileness."

Likewise, procedural default bars the court from reviewing the merits of this claim. Buchanan's trial counsel did not object to the penalty phase instruction on "vileness." Because Buchanan never presented this claim to Virginia courts and would be barred from doing so now under Va. Code Ann. §8.01-654(B)(2) and *Slayton*, 205 S.E.2d at 682, the claim is also barred from review before this court unless Buchanan demonstrates sufficient excuse for his default. *Teague*, 489 U.S. at 297-98; *Bassette*, 915 F.2d at 936-37.

Buchanan argues that counsel's omission at trial represented constitutionally ineffective assistance of counsel which should serve as excuse for his default of the claim at trial and on direct appeal. However, Buchanan never presented to Virginia courts his ineffective assistance argument as cause to excuse his trial default of this claim, so the ineffective assistance claim itself is unexhausted and procedurally defaulted. *See Justus*, 897 F.2d at 713. As a defaulted ineffective assistance claim cannot excuse petitioner's failure to present Claim IIC to Virginia courts, this court is barred from considering Claim IIC on the merits.

Claim IID: The totality of the instructions to the jury at the penalty phase of Buchanan's trial was inadequate.

Buchanan bases his argument under Claim IID solely on evidence already presented in Claims IIA, IIB, and IIC. He asserts that jury instructions in his case, viewed in totality, were constitutionally inadequate because they failed to guide the jury in deciding both the aggravating factor (vileness) and mitigating factors, making the jury's verdict unreliable and, therefore, unconstitutional. The court has already determined above that instructions regarding mitigation were constitutionally adequate and that the claims regarding unanimity and vileness instructions are procedurally barred from federal *habeas* review. As petitioner has not presented any other argument or evidence in support of his totality claim, it, too, must be dismissed as meritless.

Claim IIIA: Virginia's "vileness" aggravator is unconstitutionally vague, as was the construction of that aggravator in Buchanan's case.

Buchanan's third claim is that the Virginia capital punishment statute, as interpreted by the Virginia Supreme Court and as applied in his case, is unconstitutional. As part of this claim, Buchanan argues that Virginia's "vileness" aggravator is unconstitutionally vague, as was the construction of that aggravator in his case.

The United States Supreme Court held in *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), that if a state wishes to authorize capital punishment, it has a constitutional responsibility to tailor the law to avoid "the arbitrary and capricious infliction of the death penalty." The state must channel the discretion of the sentencer by providing the guidance of clear and objective standards for imposing the death penalty. *Id*. Because the proper degree of definition of these eligibility factors often " 'is not susceptible of mathematical precision,' a review for vagueness is quite deferential." *Tuilaepa v. California*, 114 S.Ct. 2630, 2635 (1994), *citing Walton v. Arizona*, 497 U.S. 639 (1990). Under these standards, the Virginia capital punishment statute[12] has been upheld against constitutional vagueness challenges on several occasions. *See, e.g. Hoke v.*

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[12] The death penalty statute, Va. Code Ann. § 19.2-264.2, provides:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would

Commonwealth, 377 S.E.2d 595 (Va. 1989), *cert. denied*, 491 U.S. 910 (1989); *Pope v. Commonwealth*, 360 S.E.2d 352 (Va. 1987), *cert. denied*, 485 U.S. 1015 (1988); *Gray v. Commonwealth*, 356 S.E.2d 157, *cert. denied*, 484 U.S. 873 (1987); *Stockton v. Commonwealth*, 314 S.E.2d 371, *cert. denied sub nom Stockton v. Virginia*, 469 U.S. 873 (1984); *see also Gregg v. Georgia*, 428 U.S. 153, 201 (1976) (no indication that reviewing court would construe vileness factors in Georgia statute so broadly that they could encompass any murder). The terms of the Virginia statute require that, in order to assess the death penalty upon a defendant convicted of capital murder, the sentencer must find either that the defendant poses a threat of future dangerousness or that the crime committed was outrageously or wantonly vile, horrible, or inhuman. The vileness aggravator is further defined in the statute as involving "torture, depravity of mind or an aggravated battery to the victim." Va. Code Ann. § 19.2-264.2.

In *Smith v. Commonwealth*, 248 S.E.2d 135, 149 (Va. 1978), *cert. denied sub nom Smith v. Virginia*, 441 U.S. 967 (1979), the Virginia Supreme Court reasoned that the language defining the vileness aggravator, when given a

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> commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

In the case at hand, the jury was instructed only as to the vileness aggravator, and not on future dangerousness.

reasonable and natural interpretation, accomplished the Virginia legislature's intent to be selective in choosing the types of intentional homicide that would be subject to punishment by death. The court upheld the death penalty statute against petitioner's facial challenge. The court went on, however, to explain how the vileness factors should be interpreted:

> [W]e construe the words "depravity of mind" as used here to mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. . . . [W]e construe the words "aggravated battery" to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder. . . . It seems to us that these are the only constructions rationally related to the commonly accepted connotation of the prefatory words, "outrageously or wantonly vile, horrible or inhuman."

Id. (citations omitted).

Following *Smith*, most cases addressing the issue of vague instructions or verdict forms in Virginia capital murder cases found that the trial court had included the explanatory language provided in the Virginia Supreme Court's opinion. In the federal courts, Virginia's vileness aggravator has been upheld in cases where the jury was instructed as to the meaning of the elements of the aggravator. *See, e.g. Gray v. Thompson*, 58 F.3d 59, 63 (4th Cir. 1995) (limiting instructions based on *Smith* meet constitutional standards); *Turner v. Williams*, 35 F.3d 872 (4th Cir. 1994) (same), *cert. denied sub nom Turner v. Jabe*, 115 S.Ct. 1359 (1995); *Turner v. Bass*, 753 F.2d 342, 353 (4th Cir.

1985) (jury instructed on meaning of "aggravated battery," but jury need not be instructed on each term of the vileness aggravator), *reversed in part on other grounds*, 476 U.S. 28 (1986). The Virginia Supreme Court has upheld the constitutionality of the vileness aggravator where the jury was instructed only on the bare words of the statute. In *Clark v. Commonwealth*, 257 S.E.2d 784, 790 (Va. 1979), *cert. denied*, 444 U.S. 1049 (1980), petitioner objected that the trial court had failed to define the terms of the statute in its sentencing instructions. At trial, the court explained that it felt the terms of the statute were a matter of common knowledge, but offered to consider any definitional instructions that counsel chose to submit. No instructions were submitted (in acceptable form), so none were given. The Virginia Supreme Court upheld the trial court's decision regarding the instructions, saying:

> We agree with the trial court that the terms used in the statute are commonly used and each has an accepted meaning. While the terms may have been defined in an instruction to the jury, in a manner satisfactory to this Court, the fact that the trial court did not choose to give such a definitional instruction does not constitute reversible error. Although in our review of this case we are guided by our definitions in *Smith*, it does not necessarily follow that these particular definitions were necessary for the jury to determine whether the conduct of [the defendant] was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind or aggravated battery of the victim.

Id. at 790-91; *see also Coppola v. Commonwealth*, 257 S.E.2d 797, 804 (Va. 1979), *cert. denied*, 444 U.S. 1103 (1980) (not imperative that court define the words used in capital

punishment statute; instructions which do not use precise language of *Smith* are not incorrect).

The instructions given in Buchanan's case resemble those given in *Clark* – the trial court simply read the language of the statute as its instruction to the jury. It provided the jury with a verdict form which contained essentially the same language as the statute.[13] The trial court instructed the jury that, having found Buchanan guilty to capital murder, they must determine whether to impose a sentence of death or life in prison. Future dangerousness was not considered, but the court directed that

> Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders of Douglas McARTHUR Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan, and Geraldine Patterson Buchanan, or any one of them, was outrageously or wantonly vile, horrible or inhuman, in that it

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[13] The verdict form for the capital murder sentencing read:

We, the Jury, on the issue joined, having found the defendant guilty of capital murder by having willfully, deliberately, and with premeditation killed Douglas McArthur Buchanan, Sr., Christopher Donald Buchanan, Joel Jerry Buchanan and Geraldine Patterson Buchanan as part of the same transaction and having found unanimously that his conduct in committing the murders of the above four victims, or any one of them, was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them, and having considered the evidence in mitigation of the offense, we unanimously fix his punishment at death.

> involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

(Tr. Trans., v.6, p.1580). Although the instructions did not include further explanation, it is presumed that the Virginia Supreme Court incorporated the *Smith* interpretation in its direct and independent review of the trial and sentencing records. The Supreme Court concluded that the evidence of guilt was sufficient to uphold the conviction, and that the same evidence was relied upon during the penalty phase to support the imposition of the death penalty. *Buchanan*, 384 S.E.2d at 774. "We hold that this death sentence was not imposed arbitrarily or on the basis of passion or prejudice." *Id.*

While the court believes the trial court might have explained the vileness aggravator beyond the language provided in the statute, it was not constitutionally required to do so. Even had the jury been misled or confused by the instruction, the appellate process assured that constitutionally narrow construction of the vileness aggravator was applied to the facts in this case. *See Walton*, 497 U.S. at 655-56; *see also Lewis v. Jeffers*. 497 U.S. 764, 779 (1990) ("Our decision in *Walton* thus makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the 'fundamental constitutional requirement' of 'channeling and limiting . . . the sentencer's discretion in imposing the death penalty,' has been satisfied." (citations omitted)); *Turner v.*

Williams, 35 F.3d at 893. Petitioner's claim that the aggravating factor of vileness was unconstitutionally vague as applied to his case is without merit.

Claim IIIB: Mitigating circumstances have been effectively removed from Virginia's capital sentencing scheme, as they were in Buchanan's case.

Petitioner next argues that, because a jury may find an offense to be "vile" without reference to a capital defendant's prior history and character and because the Virginia Supreme Court has no mechanism by which to give effect to mitigating circumstances when there is such a finding, petitioner was deprived of an adequate appellate review of his sentence by Virginia's capital sentencing scheme. In *Turner v. Williams*, the Fourth Circuit Court of Appeals reviewed Virginia's capital sentencing scheme under circumstances in which the jury had cited the "vileness" factor as its basis for imposing the death penalty. The Fourth Circuit held in *Turner* that Virginia provides meaningful appellate review for its death penalty cases. Specifically, the *Turner* court found that the Virginia Supreme Court's (1) determination of whether the imposition of the death penalty in a particular circumstance is the product of passion, prejudice or some other arbitrary factor, coupled with (2) a consideration of whether the penalty was excessive, in light of both the offense and the defendant himself and in relation to the punishment imposed in similar cases, satisfies the constitutional requirement of meaningful appellate review in

death penalty cases. 35 F.3d at 893, *citing* Va. Code Ann. § 17-110.1(C).[14]

In Buchanan's case, the Virginia Supreme Court, after hearing arguments and conducting an independent review of the record, specifically held that the death penalty had not been imposed as a result of the passion, prejudice or arbitrariness. The court also concluded that the imposition of the death penalty, under the particular circumstances of petitioner's offense, was not excessive or disproportionate. Although the court made no reference to petitioner's character or personal history, it was clearly authorized to take those factors into consideration under the provisions of Virginia Code § 17-110.1(C); the statute requires the appellate court to review the excessiveness of punishment while also "considering both the crime and the defendant." The court also stated specifically that its review process included consideration of the transcripts from Buchanan's sentencing hearing at which he presented his mitigation evidence.

Petitioner simply did not argue that his sentence was disproportional when viewed in the context of his own personal history. Rather, he challenged the procedures

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[14] Section 17-110.1(C) reads, in relevant part, as follows:

In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

under which the death penalty was imposed at the sentencing phase of his trial. Petitioner cannot now bemoan the Virginia Supreme Court's failure to address all the mitigating circumstances of his offense when he himself did not even raise them as grounds upon which his death penalty should have been overturned. Accordingly, the court must deny relief on this ground, as well.

Claim IIIC: Virginia's statutory verdict form mandates a sentence of death, as did the verdict form in Buchanan's case, because the form fails to provide a vehicle by which the jury can give effect to mitigating evidence and still sentence a defendant to life imprisonment once that jury finds an aggravating factor.

Buchanan admits that this claim was procedurally defaulted because it was not raised at trial; the Virginia Supreme Court also expressly held that the claim was barred from *habeas* review under *Slayton v. Parrigan*. 205 S.E.2d at 682. Petitioner argues that as any competent trial counsel would have objected to the verdict form, counsel's incompetent omission should serve as cause to excuse default of the claim. However, Buchanan did not raise these ineffective assistance allegations to the state courts during *habeas* proceedings. The ineffective assistance aspect of the claim is thus defaulted, *Justus*, 897 F.2d at 713, petitioner has failed to show cause for his default of the verdict form claim, and this court is barred from considering it on the merits. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Claim IIID: In capital murder/death sentence cases, Virginia does not provide meaningful appellate review and did not in Buchanan's case.

Buchanan admits that, on direct appeal, he did not raise either a general challenge to the Virginia Supreme Court's review of death sentences or a specific challenge to the court's general review of his own sentence. When he raised these claims in *habeas* proceedings, the Virginia Supreme Court expressly held them barred under the rule of *Slayton v. Parrigan*. 205 S.E.2d at 682. Buchanan argues that it is absurd to expect a defendant to challenge the quality of appellate review in his own case in the very petition requesting that appellate review. The court must agree.

To serve as an independent and adequate state law ground sufficient to bar federal *habeas* review, a state procedural rule cannot force litigants to "resort to an arid ritual of meaningless form." *Osborne v. Ohio*, 495 U.S. 103, 124 (1990) (citations omitted). At the time he files an appeal of his death sentence, an appellant cannot know the quality of appellate review that will be given to that appeal. A rule forcing him to challenge the appeal in the appeal prevents him from bringing any factual support to his argument and requires him to assume that the appeal will be denied. Such a rule is not only illogical, but also tantamount to an admission that appellate review of death sentences is a meaningless ritual in Virginia, as the outcome is a foregone conclusion. An illogical and meaningless procedural requirement cannot stand as an independent and adequate state law ground to which a federal court must defer in *habeas* review.

Based on the foregoing, the court finds that Buchanan is procedurally barred at this point from raising a general challenge to the quality of appellate review of death sentences in Virginia or to the constitutionality of the Virginia statute requiring appellate review of death sentences, Va. Code Ann. § 17-110.1(C),[15] as he could have raised such a claim on direct appeal, but did not see. *See Coleman*, 501 U.S. at 750. However, the court also finds that to the extent which this claim challenges the appellate review of Buchanan's own death sentence, the claim is not procedurally barred. At the same time, the court must limit its review of the claim to those arguments and evidence presented to the state courts.

In support of his claim, Buchanan presents an affidavit from attorney Robert Godfrey concerning multiple murder cases decided by the Virginia Supreme Court at or before the time of Buchanan's appeal. Petitioner did not submit this affidavit to the state courts which have reviewed this claim, explaining merely that there was no point since the state courts would only find the claim procedurally barred under *Slayton v. Parrigan*. 205 S.E.2d at 682. Given Buchanan's strong argument that he could not effectively argue a claim about his own appeal in his appeal, it is conceivable that the Virginia *habeas* courts

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[15] "In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

would have accepted this excuse and addressed his claim on the merits, had he also presented factual support for it. To present the claim before the state courts without all the supporting evidence denies those courts a meaningful opportunity to consider the claim itself and ignores the very purpose of the exhaustion requirement of §2254. As Buchanan offers no valid excuse for his failure to present Mr. Godfrey's affidavit to the state courts, this court is barred from considering it. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992). This court must consider the claim solely based upon the facts which were also presented to the state *habeas* courts. Specifically, Buchanan alleges that 1) the Virginia Supreme Court did not adequately consider mitigating factors evidence, in determining whether the death sentence had been imposed arbitrarily, and 2) did not properly apply the Virginia proportionality review as required by statute. Va. Code Ann. § 17-110.1(C).

Federal constitutional protections in the death penalty context simply require that the death penalty not be imposed by a state in an arbitrary or capricious manner. *Godfrey v. Georgia*, 446 U.S. at 428. There is no constitutional right to any specific type of state appellate review of death sentences, although most of the statutes which have been upheld as constitutional include provisions for prompt and automatic appeal as one aspect of ensuring that the death sentence was not arbitrarily or capriciously imposed. *See Pulley v. Harris*, 465 U.S. 37, 49-51 (1984). Thus, petitioner's claim must be analyzed on two fronts: 1) whether the Virginia Supreme Court correctly applied Virginia law in Buchanan's death penalty case and 2) whether the review petitioner received was adequate to satisfy the federal protections set forth in *Godfrey*.

The rule in Virginia is that the mitigating factors mentioned in the statute are not listed for the sentencer so that the jury is not misled into thinking those factors are the only ones which may be considered. *Watkins v. Commonwealth*, 331 S.E.2d 422, 438 (1985), *cert. denied*, 475 U.S. 1099 (1986). *See also Zant v. Stephans*, 462 U.S. 862, 890 (1983) (states not constitutionally required to adopt specific standards for instructing jury in its consideration of mitigating circumstances). Thus, there is no appellate review right in Virginia to determine whether the jury's sentencing verdict complied with the mitigating factors listed in the Virginia Code. Indeed, the exclusion of evidence which prevents the sentencer from considering *any* mitigating factor or other relevant circumstance that could cause it to decline imposing death would run afoul of the federal guarantee that all those subject to the death penalty be treated as "uniquely individual human beings." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (emphasis added); *see McCleskey v. Kemp*, 481 U.S. 279, 306 (1987) (state cannot limit sentencer's consideration of any relevant circumstance that could cause it to decide against imposing death).

All that is required under Virginia law, then, is appellate review to determine if the sentence was "imposed under the influence of passion, prejudice, or any other arbitrary factor." Va Code § 17-110.1(C)(1). As discussed in Claim IIIB above, the Virginia Supreme Court analyzed the record of petitioner's sentencing and found that the death sentence was not arbitrarily imposed. *Buchanan*, 384 S.E.2d at 774. This court has undertaken an independent review of the sentencing phase transcript of Buchanan's trial and does not find fault with the decision

of the Virginia Supreme Court. The sentencing jury heard numerous witnesses tell them about Buchanan's family background: how he was "cut off" from visiting, seeing, or talking to any of his maternal relatives when his mother died and his father re-married, how his grandparents had to go to court for the right to even visit with petitioner for four hours a week, about his father's and step-mother's difficulties with alcohol, about the number of times petitioner ran away from home, and about how that background affected his mental stability. They also heard about how Buchanan regularly attended church, that petitioner turned to substance abuse because of his family problems, about his honorable service in the Army, about the role Christianne Buchanan may have played in encouraging petitioner to kill his family, and about what mental state Buchanan may have been in when he first started arguing with his father on the date of the killings. As the Virginia Supreme Court must have reviewed this evidence when reviewing the sentencing transcript, this court finds that Buchanan received an adequate appellate review of his death penalty case, including all mitigation evidence, in satisfaction of Virginia law and in satisfaction of the federal guarantee that the death penalty be imposed in a non-arbitrary manner.

Nor does Buchanan state a cognizable claim on the question of proportionality review by the Virginia Supreme Court. There is no federal right to proportionality review in a state death penalty case. *Pulley v. Harris*, 465 U.S. at 50-51. Petitioner's federal proportionality claim is, therefore, reduced to a question of due process – whether the Virginia Supreme Court properly applied the proportionality statute, § 17-110.1(C), in his

case. In determining whether a sentence of death is excessive, or disproportionate, the state supreme court need inquire only whether juries in the jurisdiction generally approve the supreme penalty for comparable or similar crimes. *Pruett v. Commonwealth*, 351 S.E.2d 1, 14 (1986), *cert. denied*, 482 U.S. 931 (1987). In Buchanan's case the Virginia Supreme Court stated:

> We have accumulated death penalty cases involving Code § 18.2-31(g), and other death penalty cases involving death by gunshot where the death penalty was based on vileness, and we conclude that juries in Virginia customarily impose the death sentence in cases of this kind.

Buchanan, 384 S.E.2d at 774 (citations omitted).

The Fourth Circuit, in its consideration of *Coleman v. Thompson* 895 F.2d 139, 146-47 (4th Cir. 1990), *aff'd*, 501 U.S. 722 (1991), found that the Virginia Supreme Court's decision not to commute the petitioner's death sentence was supported by its "independent . . . determin[ation] that the sentence of death was properly imposed." The Fourth Circuit held that the Virginia court's review of Coleman's death sentence under Va. Code Ann. § 17-110.1(c). satisfied the constitutional requirements of channeling and limiting the sentencer's discretion to impose the death sentence. *Id.*

The proportionality review conducted by the Virginia Supreme Court in Coleman's case was nearly identical to that court's proportionality review of Buchanan's death sentence. *See Coleman v. Commonwealth*, 307 S.E.2d 864, 877 (Va. 1983), *cert. denied*, 465 U.S. 1109 (1984); *cf. Buchanan*, 384 S.E. 2d at 774. The Fourth Circuit found

that this proportionality review satisfied the requirements of Va. Code Ann. § 17-110.1(C). *Coleman*, 895 F.2d at 147. Thus, it is clear that Buchanan received the full extent of proportionality review to which he was entitled under Virginia law, and, accordingly, that he was not denied due process in violation of the Fourteenth Amendment.

Claim IIIE: Virginia's sentencing scheme as a whole, generally, and as applied to Buchanan, is constitutionally deficient.

All of petitioner's arguments in support of this claim are simply repetition of earlier claims which the court has found to be procedurally barred from federal review or to be without merit. Accordingly, this claim also must be dismissed.

Claim IV: The court unconstitutionally refused to instruct the jury (and send the case to the jury) as to the lesser included offense of second degree murder.

Respondent argues that this claim is procedurally barred from federal review because when Buchanan presented it on direct appeal, he did not assert that failure to instruct the jury on second degree murder violated his federal constitutional right to due process. It is clear that the Virginia Supreme Court analyzed the claim as though it were brought under Virginia law only and found it meritless. In his *habeas* pleadings, Buchanan repeated the claim, but added language contending that failure to give the instruction violated his federal constitutional right to

due process. In denying *habeas* relief, the state circuit court found that the federal constitutional claim was barred by the default rule of *Slayton v. Parrigan*, 205 S.E.2d at 682. The Virginia Supreme Court also applied the *Slayton* rule to the second degree murder instruction claim "to the extent [it] advance[d] matters not asserted on direct appeal." Petitioner argues that because the state and federal claims are all but identical in factual and legal analysis, he has presented the Virginia Supreme Court with the substance of the federal claim in satisfaction of the §2254 exhaustion requirement.

The United States Supreme Court has expressly held that §2254 requires a federal *habeas* petitioner to present the state courts with a "fair opportunity" (1) to address the "substance of his federal *habeas corpus* claim" and (2) "to apply controlling legal principles to the facts bearing upon" that claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982), *citing Picard v. Conner*, 404 U.S. 270, 276-78 (1971). *See also Duncan v. Henry*, 115 S.Ct. 887, 888 (1995) (citing *Harless*, held that failure to exhaust federal due process aspect of *habeas* claim regarding state trial court's evidentiary ruling was insufficient to satisfy §2254 exhaustion requirement). "It is not enough that all the facts necessary to support the federal claim were before the state court . . . or that a somewhat similar state-law claim" was presented to them. *Harless*, 459 U.S. at 6. Petitioner's presentation of his claim must "fairly apprise a reviewing court of a potential federal claim" or he has failed to satisfy §2254 exhaustion requirements. *Id.* at 7 n. 3.

After review of Buchanan's direct appeal, the court finds that his presentation of his second-degree murder instruction claim did not "fairly apprise" the Virginia

Supreme Court that he was raising the claim under both Commonwealth law and federal constitutional law. He does not mention the words "federal" or "constitutional" nor does he cite any federal case law in his argument supporting the claim. Under *Harless* and §2254, this court must find that claim IV as raised in this petition was not adequately presented in Buchanan's direct appeal to satisfy exhaustion requirements. Although Buchanan has now exhausted the federal claim by presenting it to the state courts during *habeas* proceedings, he offers no viable excuse for his procedural default of the claim on direct appeal. Accordingly, the Virginia Supreme Court denial of *habeas* relief under *Slayton* serves as an independent and adequate state law bar to federal review; this court is barred from review of the merits of Claim IV. *Coleman*, 501 U.S. at 750.

Petitioner apparently argues that the court should recognize an exception to the strict pleading requirements set forth in *Harless* where, as here, the state and federal claims are all but identical. *See Briley v. Bass*, 742 F.2d 155, 165 (4th Cir. 1984), *cert. denied*, 469 U.S. 893 (1984) ("Virginia and the Circuit and the Supreme courts agree that lesser-included offense instructions are not required where . . . there is no support for such instructions in the evidence"). *See also Hopper v. Evans*, 456 U.S. 605, 611-12 (1982) (federal rule is that lesser included offense instruction need be given only if evidence would permit jury rationally to find defendant guilty of the lesser offense and acquit him of the greater). The court cannot agree. Before the Virginia Supreme Court, Buchanan clearly sought relief under state law. He gave

the state court no inkling of an intention to implicate the broader reaches of federal due process law as well.

Even assuming that the federal constitutional claim were not procedurally barred, the court finds no merit to the claim. To convict a person of first degree murder, where felony murder is not involved, the prosecution must prove that the killing was "willful, deliberate, and premeditated." Va. Code Ann. §18.2-32. Therefore, to prove entitlement to a second-degree murder instruction, petitioner would have to demonstrate that the evidence at trial supported a rational finding by the jury that Buchanan did not form an intent to kill each of his four victims before inflicting the fatal wounds upon them. *See Smith v. Commonwealth*, 261 S.E.2d 550, 553 (Va. 1980) (to premeditate means to adopt a specific intent to kill, and premeditation is what distinguishes first and second-degree murder).

On direct appeal, the Virginia Supreme Court addressed the issue of whether the evidence supported a second degree murder instruction as to his father's killing, reviewing in detail Buchanan's various attempts to explain his state of mind and why the killings happened. In the end, the court held:

> We are of the opinion that Buchanan was not entitled to a second degree murder instruction regarding his father's murder. This murder was planned. The only reason it was not carried out the day before was because Buchanan made a conscious decision not to do it at that time. But, the next day, he returned to his father's house prepared to kill and intending to kill. Buchanan did not say he killed in anger. He did not say he

felt provoked. He did not say he shot without thinking. His father had broken off the disagreement and turned his back to walk out the door when Buchanan – having time to think and, by his own admission, intending to kill – shot him in the back of the head. "A design to kill may be formed only a moment before the fatal act is committed provided the accused had time to think and did intend to kill." *Giarrantano v. Commonwealth*, 220 Va. 1064, 1074, 266 S.E.2d 94, 100 (1980). *See Barnes v. Commonwealth*, 234 Va. 130, 136, 360 S.E.2d 196, 201 (1987); *Bradshaw v. Commonwealth*, 174 Va. 391, 399, 4 S.E.2d 752, 755 (1939). Once his father fell, Buchanan shot him between the eyes. In our view, Buchanan relies on but a scintilla of evidence to support his motion for a second degree murder instruction; this is not enough. The evidence to which he points falls far short of proving provocation, anger, passion, or any other fact that might serve to convince a jury that Buchanan acted without premeditation.

Buchanan, 384 S.E.2d at 770-71. This court is not bound under §2254 to presume these findings correct, as the issue at stake is a mixed question of law and fact, requiring *de novo* review of both. However, after review of the record, the court fully agrees with the Virginia Supreme Court's findings.

From the physical evidence alone, a jury could not rationally have found that Buchanan did not form an intent to kill each of his victims. All of the victims had multiple wounds; even if an initial wound was inflected unintentionally or in the heat of anger or hurt, his subsequent attacks on each of the victims demonstrate an

intent to kill that victim. After shooting his father, and later Donnie, once in the head, he fired a single, follow up shot into each victim's head at point blank range. When J.J. got up after a shot to the head, Buchanan went in the other room to get a knife and stabbed the boy numerous times until he could no longer get up. Buchanan admitted in statements his intent to kill Geraldine. He covered all trace of the killings in the living-room and paced the floor, waiting for her to come home, his weapons at the ready. He stated, "I wasn't going to leave there until I killed her." And he has never denied wearing rubber gloves the entire afternoon during the killings; this fact alone is a strong indication of premeditation, as the only common sense reason to wear gloves when going to the house was to prevent leaving fingerprints at the scene of an intended crime.

Buchanan's testimony about his state of mind is both inconsistent with his physical acts and insufficient to support a criminal finding of anything less than intent to kill. He testified that he did not plan to kill that afternoon, but also testified to specific planning he and Christianne had done the previous evening. He testified that "it just happened" and that he went "crazy" after killing his father, but the fact that he does not understand his actions now cannot counteract other testimony and physical facts indicating that he had, in fact, formed an intent to kill each victim before inflicting a fatal wound. Buchanan said that he was ready to leave when the boys came home, blocking his escape through the front door, but he did not leave or explain why he could not have left out another door. He admitted that nothing anyone had done "set it off at this particular time." Simply put, the

court is of the opinion that nothing in the evidence provided basis upon which a jury could rationally have found Buchanan guilty of anything less than first degree murder and that Buchanan is not entitled to *habeas* relief on this claim. *Hopper*, 456 U.S. at 611-12.

Claim V: During the guilt phase, the court unconstitutionally failed to instruct the jury as to the meaning of the term "transaction" under Virginia Code §18.2-31(g).

Buchanan admits that counsel failed to submit any instruction to the trial court concerning a definition of transaction or to argue on direct appeal that the court erred in failing to give such an instruction. In denying petitioner's *habeas* appeal, the Virginia Supreme Court expressly held the claim barred under the default rule of *Slayton*. Even if Buchanan contends that the default was caused by constitutionally ineffective assistance of counsel, as he failed to raise these allegations about counsel before the state courts in any proceeding, the ineffective assistance claim is defaulted and cannot serve as cause to excuse the default of the underlying claim itself. *Justus*, 897 F.2d at 713. Thus, this court is barred from addressing Claim V on the merits. *Coleman*, 501 U.S. at 750.

Claim VI: Virginia Code §18.2-31(g) is unconstitutionally vague because it fails to define the word "transaction."

In Claim VI, petitioner asserts that the multiple murder provision of Virginia's capital murder statute is unconstitutionally vague, because it fails to define the

word "transaction." Section 18.2-31 of the Virginia Code provides, in pertinent part:

> Capital murdered defined; punishment. The following offenses shall constitute capital murder, punishable as a Class 1 felony:
>
> . . .
>
> 7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction.[16]

Buchanan contends that the word "transaction" is susceptible to many different definitions and interpretations. As a result, he claims that the use of the word "transaction" in Virginia Code §18.2-31(7), when applied to his case, violated his Sixth, Eighth, and Fourteenth Amendment rights. Challenging the statute on its face, petitioner argues that the language of the statute encompasses such a broad spectrum of behavior that it does not sufficiently limit the circumstances for which a defendant could become eligible for the death penalty. The Commonwealth responds that the statute was sufficiently clear to have put petitioner on notice that his conduct was prohibited.

The vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness

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[16] The subsections of Va. Code § 18.2-31 were recently renumbered. At the time petitioner committed the murders, the relevant subsection was designated as subsection (g). This subsection was originally added to the capital murder statute in 1981, and was intended to add multiple murders as a crime that qualified for capital treatment. The language of the renumbered section is identical.

that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citing *Hoffman Estates v. Flipside*, 455 U.S. 489 (1982); *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Connally v. General Construction Co.*, 269 U.S. 385 (1926)). The United States Supreme Court in *Kolender* further explained that:

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith*, 415 U.S. at 574. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* at 575.

461 U.S. at 357-58. Based on this analysis, the loitering statute at issue in *Kolander* was voided for vagueness because it did not explain what was intended by the requirement that an individual present police officers with "credible and reliable" identification upon being stopped and questioned. *Id.* at 361. "[The statute] is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Id.*

The Virginia courts have adopted the vagueness standards and rationale of the federal courts. In *Flannery v. City of Norfolk*, 218 S.E.2d 730, 733 (Va. 1975), the Virginia Supreme Court adopted the words of the United States Supreme Court to explain that:

> "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."

(quoting *Colton v. Kentucky*, 407 U.S. 104, 110 (1972)). The Virginia court also noted that it would consider whether the words at issue in a vagueness challenge have a well-settled common law meaning and whether the language has been narrowed through judicial decisions. *Id.*

The Virginia Supreme Court applied these standards when it examined the same capital murder provision now challenged by petitioner. In *Woodfin v. Commonwealth*, 372 S.E.2d 377 (Va. 1988), the state court rejected the criminal defendant's contention that the phrase "same act or transaction" as used in the capital murder statute is unconstitutionally vague.[17] An analysis of the statutory

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[17] More specifically, the court in *Woodfin* rejected the facial challenge to the statute outright, concluding that the defendant/appellant had no standing to make such a challenge where he did not contend that his conduct was constitutionally protected or that the First Amendment was implicated. 372 S.E.2d at 379. The court addressed only the narrow question of whether the statute was vague as applied to the defendant/appellant's conduct in that case. *Id.*

language showed that it was sufficient to give an ordinary person notice that his contemplated conduct was forbidden and that the statute did not encourage selective law enforcement. *Id.* at 379. The court stated:

> In the context of this statute, there is nothing uncertain or ambiguous about the phrase "same act or transaction" when applied to defendant's actions. The language is synonymous with "same criminal episode." *State v. Boyd*, 533 P.2d 795, 799 (1975). In other words, two offenses arise out of the "same act or transaction" if they are connected so closely "in time, place and circumstance that a complete account of one charge cannot be related without relating details of the other charge." *State v. Fitzgerald*, 516 P.2d 1280, 1284 (1973).
>
> In the present case, the evidence shows that two murders were committed at the same location, about the same time, and under the same circumstances. Therefore, given his conduct, the defendant reasonably should have been on notice that the statute applied to his actions when it defined capital murder as killing "more than one person as a part of the same act or transaction." Thus, the statute satisfies the constitutional requirement of definiteness and complies with the standard forbidding arbitrary and erratic law enforcement.

Id. at 379.

Petitioner argues that the holding in *Woodfin* should not influence the vagueness analysis in his case, since *Woodfin* was decided months after petitioner was convicted and sentenced. He asserts that at the time he committed his crimes, the statutory language was unclear

as to what conduct would be considered part of the same "transaction." In short, petitioner contends that because there was no judicial limitation placed upon the statutory language at the time he committed the murders, the statute was unconstitutionally vague as applied to him.

The court rejects this argument, and agrees with the Commonwealth that the language of the statute itself was sufficiently clear to notify the defendant that this course of conduct was prohibited. As the Virginia Supreme Court found during consideration of petitioner's direct appeal, the "four murders were committed at the same place, under the same circumstances, within a narrow time span." *Buchanan v. Commonwealth*, 384 S.E.2d at 771. Therefore, as applied to petitioner, the term "transaction" clearly encompassed all of the criminal acts committed over the time span during which the murders occurred. A person of ordinary intelligence who was in petitioner's position at the time the murders were committed certainly would have understood that the statutory language prohibited those acts. Furthermore, in the situation at hand, there is no support for the proposition that the capital murder statute was enforced in an arbitrary manner. As the court is of the opinion that the Virginia statute passes constitutional scrutiny under the vagueness doctrine, petitioner is not entitled to relief on this claim.

Claim VIIA: Buchanan was not adequately informed of what the Commonwealth intended to prove or against which "transaction" he had to defend.

In Claim VII of his *habeas* request, petitioner asserts that he was denied due process, assistance of counsel,

and the right to present evidence because the indictments against him were framed in a vague and inappropriate manner. In the first part of this claim, petitioner says that the indictments failed to inform him of what the Commonwealth intended to prove and on which alleged "transaction" it intended to make its case.

Long-established principle holds that an accused must be informed as to the charges against him so that he may prepare his defense and not be taken by surprise at trial. *See Berger v. United States*, 295 U.S. 78, 82 (1935). In addition, an indictment must provide adequate notice of the charges against the defendant so that he may be protected against another prosecution for the same offense. *Id.* It is also well-established, however, that an indictment is sufficient if it sets forth the offense in the words of the statute itself, as long as "those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *United States v. Carll*, 105 U.S. 611, 612 (1881). "Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *United States v. Hess*, 124 U.S. 483, 487 (1888). *See also United States v. American Waste Fiber Co.*, 809 F.2d 1044, 1046 (4th Cir. 1987) (indictment must alert defendant and counsel to all necessary elements of offense charged and be sufficiently detailed to be pled in another prosecution to avoid double jeopardy).

Buchanan protests that the capital murder indictments against him were constitutionally insufficient to provide him notice of the charges against him. Petitioner was eventually tried on three separate capital murder indictments. The first indictment (No. 5784) charged petitioner with violating the capital murder statute through the premeditated killing of Buchanan, Sr. "as a part of the same act or transaction of" the premeditated killing of "one or more other persons, to-wit: Joel Jerry Buchanan, Christopher Donald Buchanan, or Geraldine Patterson Buchanan." The second capital murder indictment (No. 5947) included two counts – count one charged petitioner with murdering, in the same transaction, Douglas Buchanan, Sr. and Christopher Donald Buchanan; and count two charged petitioner with murdering, in the same transaction, Douglas Buchanan, Sr. and Geraldine Buchanan. The third capital murder indictment (No. 5948) also contained two counts – count one alleges that petitioner murdered, in the same transaction, Christopher Donald Buchanan and Joel Jerry Buchanan; and count two alleges that petitioner murdered, in the same transaction, Joel Jerry Buchanan and Geraldine Patterson Buchanan.

Buchanan argues that, because of the manner in which the indictments were framed, he was not sufficiently notified of the charges against which he was asked to defend. Specifically, the defendant asserts that he was not properly notified as to which "transaction" the Commonwealth intended to prove.

As the Virginia Supreme Court pointed out during petitioner's direct appeal, however, the Commonwealth is entitled to charge the commission of a single offense in

several different ways in order to meet the contingencies of proof. *Buchanan*, 384 S.E.2d at 762 (citing *Bryant v. Commonwealth*, 53 S.E.2d 54, 56 (Va. 1949) and R. Bacigal, *Virginia Criminal Procedure* § 13-6 (1983)). In this case, because Buchanan could theoretically have been convicted on two counts of capital murder, each involving two different victims, the Commonwealth was justified in outlining the different possible permutations of "transaction" under which petitioner might have been found guilty. The indictments themselves are adequately clear as to which transactions the Commonwealth was entitled to try to prove. Buchanan was given sufficient notice that he was defending against all of the possible "transactions" described in the indictments. In other words, the indictments alerted petitioner to the fact that the Government had several alternative theories under which it was seeking a capital murder conviction. One theory (shown by indictments no. 5784 and no. 5947) was that petitioner murdered Buchanan, Sr. and one or more of the other victims in the same transaction. This theory encompasses all transactions which involve the killing of Buchanan, Sr. The second theory (contained in count one of indictment no. 5948) was that petitioner murdered Joel Jerry Buchanan and Christopher Donald Buchanan in the same transaction. And another theory (from count two of indictment no. 5948) was that petitioner murdered Joel Jerry Buchanan and Geraldine Buchanan in the same transactions. The court is of the opinion that the indictments very clearly state the different possible transactions, and that the Commonwealth is entitled to pursue alternative theories in a criminal trial. Buchanan was not denied due process, effective assistance of counsel, or the

right to present evidence simply because he was forced to defend against alternate charges.

Claim VIIB: The trial court unconstitutionally limited opening statement of defense counsel by refusing to allow any discussion of the number of indictments.

The second part of petitioner's claim concerning the multiple capital murder indictments against him is that the trial court unconstitutionally limited his defense counsel's opening statement by refusing to allow any discussion of the number of the indictments in the case. Buchanan asserts that this restriction resulted in a denial of due process, the effective assistance of counsel, and the right to present evidence.

The court is of the opinion that this argument is also without merit. Petitioner did not have a constitutional right to give an opening statement, and a trial court has the authority to place restrictions upon subjects to be commented on during opening statements. *See, e.g. United States v. Odone*, 888 F.2d 1014 (4th Cir. 1989) (trial judge attempted to set forth ground rules for opening statements; when one defendant failed to comply, court had the discretion to sever the trial of that defendant); *United States v. West*, 877 F.2d 281 (4th Cir. 1989) (trial court justified in stripping defendant of *pro se* status when he did not follow restrictions placed upon his opening statement); *Arnold v. Eastern AirLines*, 681 F.2d 186 (4th Cir. 1982) (trial court justified in prohibiting comments about the defendant's settlement practices); *United States v.*

Pinkerman, 374 F.2d 988 (4th Cir. 1967) (trial court prohibited government from mentioning defendant's incriminating statements during opening remarks).

It is not the function of the opening statement "to apprise the accused of every aspect of the charges against him – that is done by the indictment." *Butler v. United States*, 191 F.2d 433, 435 (4th Cir. 1950). By the same token, the opening statements of counsel are not intended to inform the jury as to the specific elements of the crimes involved. Rather, opening statements are intended to give the jury an objective summary of the evidence that each side expects to produce. *United States v. Wright-Barker*, 784 F.2d 161, 175 (3d Cir. 1986). At the close of the evidence, it is the function of the trial court to give instructions on the specific findings that the jury must make in order to convict the defendant of a particular charge. The court finds that the restrictions the trial court placed upon the parties' opening statements in this case were within its discretion and did not affect the constitutional rights of petitioner.

Claim VIII: The trial court unconstitutionally denied Buchanan's motion for change of venue.

Part A of Claim VIII, concerning general pretrial publicity, was first raised by petitioner in his motion for change of venue; the claim was properly exhausted when raised on direct appeal and was not procedurally defaulted. However, Part B of Claim VIII is procedurally barred because the issue of false information in the pretrial publicity was not mentioned in Buchanan's motions at trial for change of venue or raised in his direct appeal.

The Virginia Supreme Court noted on direct appeal that Buchanan had not complained of false publicity as a grounds for his venue motion; then, in state *habeas*, the Supreme Court found the venue change claim barred under the rule of *Slayton* to the extent that it raised a matter not asserted on direct appeal. Ineffective assistance of counsel cannot serve as cause for this default, as no allegations concerning counsel's ineffectiveness were raised in the state *habeas* courts to excuse the *Slayton* default and as Buchanan has not offered any explanation for this omission. *Justus*, 897 F.2d at 713.

Likewise, the court is barred under *Keeney* from considering any evidence concerning false information in pretrial publicity as supporting evidence for Part A of the claim, as petitioner argues. 504 U.S. at 8. Simply presenting evidence of the publicity to the state courts was not the equivalent of proving information in that publicity to be patently false and, therefore, prejudicial. Buchanan has not offered any reason for his failure to develop the false information evidence in the trial motions or in the direct appeal; the very fact that the Virginia Supreme Court noted this failure in making its decision on direct appeal suggests that the decision on appeal might have been different if the trial court had been faced with clearly false information in pretrial publicity. This situation is an excellent example of the reasoning behind application of default rules to development of supporting evidence in state court proceedings. If the state courts are not presented with a fair representation of petitioner's claims and all the relevant proof of those claims, they are not being presented with a fair opportunity to correct their own constitutional errors. Because Buchanan failed to

develop his false information evidence before the state trial and appellate courts, this court is barred from considering Claim VIIIB, either as a separate claim or as additional information is support of Claim VIIIA. *Id.* and *Coleman* 501 U.S. at 750.

In Claim VIIIA, Buchanan essentially claims that the court denied him his Sixth Amendment right to an impartial jury because the trial judge refused to grant his motion for a change of venue based on general, pretrial publicity. Buchanan avers that potential jurors in Amerst County had been so inundated by local pretrial publicity, which would prejudice them against him from the start, that the only way for him to receive a fair trial was for the court to grant the venue change.

Where pretrial publicity raises a possibility of jury bias, the court has a constitutional duty to explore through adequate *voir dire* the impact, if any, which such publicity has had on jurors' ability to be impartial. *See Wells v. Murray*, 831 F.2d 468, 472 (4th Cir. 1987). The trial court need not question venire persons on the content of publicity to which they were exposed so long as *voir dire* is adequate to determine if prospective jurors could remain impartial despite pretrial publicity and decide the case only upon the evidence presented to them during trial. *Mu'Min v. Virginia*, 500 U.S. 415, 427 (1991). A reviewing court should not easily second guess the trial court's *voir dire* because it is the trial judge who must reach factual conclusions regarding impartiality and credibility by relying on demeanor evidence and responses to questions. *Rosales-Lopez v. United States*, 451 U.S. 182, 188-90 (1981). A trial judge's decision not to change venue, because he believes an impartial jury *can* be

seated, will only be overturned by a reviewing court for "manifest error." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (emphasis added).

There is no evidence provided by petitioner in either the initial petition or any of the papers filed in opposition to the respondent's motion which even hints at a violation of petitioner's right to an impartial jury. Though the trial court acknowledged that there had been some publication of the facts surrounding the murders and the trial of Buchanan's wife, Christianne, Buchanan's prospective jury members, when questioned during *voir dire*, did not exhibit the sort of partiality and pretrial publicity knowledge which would have necessitated a change of venue or which would lead a reviewing court to find that the jury had been tainted. *See Patton v. Yount*, 467 U.S. 1025, 1026 (1984).

Unlike *Shepard v. Maxwell*, 384 U.S. 333, 347 (1966), in which the judge refused to question the venire persons about the effect of media publicity, in Buchanan's case the judge was very careful to ask prospective jurors if they were aware of the case and if they could put aside what they had heard from any other source and decide the matter based solely on the evidence presented at trial. Only two jurors, Donald Hendrick and Albert Hartberger, exhibited an inability to put aside what they had heard about the trial, and they were dismissed for cause by the court. (Trial Tr. 41-45, 154-163). Other jurors evidenced only minimal to moderate knowledge about the events

surrounding the trial, and, to a person, they will said they could put what they had previously heard behind them.[18]

Buchanan points to one lone article detailing his wife's conviction as his proof that venue should have been changed. That showing does not rise to the level at which this court would find that the trial judge abused his discretion when he did not grant the change of venue motion. The evidence shows quite the opposite, in fact, and this court finds that "[s]electing the jury was relatively easy, . . . the publicity was accurate and noninflammatory, and . . . there was no indication [among the venire persons] of 'widespread prejudice.' " *Buchanan*, 384 S.E.2d at 768. Petitioner is not entitled to relief on this claim.

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[18] Of the twelve jurors and two alternates actually seated, Jerry Baker (Tr. 45-63), Strother Snead (Tr. 172), Thomas Cheryba (Tr. 321-22), George Speidell (Tr. 417), Joseph Liggon (Tr. 426), Mark Shrader (Tr. 577), and Linda Laughlin (Tr. 590), were moderately aware of the circumstances surrounding the murder and some were also cognizant that Christianne Buchanan had been convicted a few days earlier as an accomplice to the murder. The other members of the selected jury panel: Thomas Hardy (Tr. 193-94), Myra Ramsey (Tr. 277), Juanita Roberson (Tr. 308-09), Audrey Hudnall (Tr. 438), John L. Smith (Tr. 463-64), Diane Young (Tr. 500), and Margaret Cash (509-10), only exhibited minimal knowledge of the murders and Christianne's trial. Similar patterns can also be seen with the jurors stricken for cause by the court (most of whom were dismissed because of an inability to impose the death penalty) as well as among those who were removed through the use of challenges used by the trial counsel.

Claim IXA: The trial court refused to let defense counsel ask jurors if each believed that a death sentence is the only appropriate sentence for capital murder.

Buchanan argues that the trial court denied him due process by erroneously refusing to allow Buchanan's counsel to ask prospective jurors, "Do you believe that a death sentence is the only appropriate punishment for capital murder?" This claim is without merit. *Buchanan* relied upon *Morgan v. Illinois*, which held that a defendant must be allowed to inquire whether a juror would "automatically vote for the death penalty in every case." 504 U.S. 719, 729 (1992). However, state trial courts retain great latitude in deciding what questions are to be asked during *voir dire*. *Mu'Min*, 500 U.S. at 424-26. The trial court told Buchanan's counsel, "I don't object to you asking in a different way about whether [the juror] would automatically give the death penalty," and the trial court directly asked the prospective jurors if they could consider voting for a sentence less than death. (Tr. at 234, 253).

Buchanan's counsel agreed that the trial court had asked the questions required by law. (Tr. at 253). The trial court explained that the reasons for disallowing the proposed line of inquiry was the question's argumentative nature. (Tr. at 247-255). The trial judge also objected to proposed questions regarding the "appropriate punishment" for capital murder without explanation of the punishments legally available for capital murder. The trial court explained, "[t]he jury is not considered to be a group of lawyers who know all the legal answers." (Tr. at 291-2). The trial court allowed Buchanan's counsel to ask

clear, re-phrased *Morgan*-type questions of prospective jurors, as demonstrated in the following examples:

> To Mrs. Rhodes:
> "Do you understand that if the defendant is convicted of capital murder that the death penalty is not automatic in those cases? . . . Do you have any religious or personal or ethical beliefs that would require you to vote for the death penalty and not consider life imprisonment?"
>
> To Mr. Cheryba:
> [I]f Douglas McArthur Buchanan, Jr.–that's him, Doug here – is convicted of capital murder, would you feel incumbent to impose the death penalty or would you follow the law and consider each of the criteria as instructed by the court . . . and make up your mind based on the evidence and the law?
>
> To Mrs. Giles:
> Do you understand that the death penalty – even if he is convicted of capital murder, the death penalty is not automatic? . . . You understand that the jury has to listen to all of the evidence, both in his favor and against him, and then decide whether . . . death is the appropriate punishment or life imprisonment is the appropriate punishment? . . . [Y]ou would be willing to consider life imprisonment if you felt like the facts merited that?

The court allowed counsel to ask Mr. Lewandoski the following questions:

> Do you believe if you heard this case and decided, based on the evidence, to impose a life sentence rather than the death penalty that you would be under any pressure from – or that you would catch any hard – ill feelings from the people at work . . . Do you feel like you can consider everything – every factor that comes into evidence in this case and fairly consider the possibility of a life sentence with that pressure in the background [from people at work who felt the only choice for Buchanan's punishment was the death penalty]?"

When Mr. Lewandowski said no to the second question, the court followed up with questions of its own: "What you're saying is that you feel – you would feel an undue amount of pressure from people who would see you after the case was over if you had voted for some punishment that they didn't approve of? . . . So would that affect your decision in the cases, do you think? Do you have some reasonable doubt about it in your mind?" Mr. Lewandowski answered, "Yeah, I think I do. Yes." The court dismissed him from the case immediately. *See* Tr. at 267, 335, 349-350, 371-374.

As these examples make clear, the trial court met the constitutional requirements set out in *Morgan*, 504 U.S. at 729. The Virginia Supreme Court ruled on direct appeal that the trial court had correctly refused the tendered question, *Buchanan*, 384 S.E.2d at 765. The trial court afforded ample opportunity for counsel to ask relevant questions, and the questions actually allowed and asked by the trial court were sufficient to preserve Buchanan's right to a trial by a fair and impartial jury. U.S. Const., amend. VI and XIV.

Claim IXB: The trial court refused to allow Buchanan's counsel to ask non-conclusive, open-ended questions of jurors to explore their pre-existing attitudes about the case resulting from exposure to pretrial publicity.

As stated above, state trial courts retain great latitude in deciding what questions are to be asked during *voir dire*. *Mu'min*, 500 U.S. at 424-26. A defendant is constitutionally entitled only to know whether a juror can remain impartial in light of information that juror has previously obtained, not to explore the specific content of the acquired information. *Id.* at 431. "It is not required . . . that the jurors be totally ignorant of the facts and issues involved." *Irvin*, 366 U.S. at 722. The material inquiry in *voir dire* is not whether jurors know details about the case, or even that they have some impressions about what may have happened, based on what they have read or heard. The material inquiry is whether the jurors have "such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton*, 467 U.S. at 1035.

Not long into the *voir dire* process, Buchanan's counsel asked Juror Hartberger, "No [sic] what impressions do you have about Douglas' involvement in the case from what you've read? . . . You believe he did it from what you read?" Mr. Hartberger answered, "from what I read, I'd have to say yes. . . . [T]he newspapers, the television and everything has kind of impressed upon me that there's no doubt he's guilty." The court questioned Mr. Hartberger further about whether he could put aside what he had read and judge the case only upon the evidence presented to him at trial. Mr. Hartberger said

that he thought he could. He said, "I've never said that he's guilty. I said if I believed what the newspaper said, then I would assume that he was guilty." The court dismissed this juror for cause, but admonished Buchanan's attorneys not to ask jurors about their impressions of the case or to pose hypothetical questions about what jurors believed about the case based on newspaper reports. Buchanan claims these limitations prevented him from determining whether or not jurors retained the ability to be impartial. He further alleges that the questions asked and allowed by the court suggested the answers jurors should give if they wanted to serve on the jury. (*See* Tr. 153-68)

The court finds no merit to this claim. While the trial court's questions to jurors about pretrial publicity were, for the most part, answerable with a yes or a no, they are precisely the sort of *voir dire* questions which were found constitutionally adequate in *Mu'min* to evaluate juror impartiality.[19] 500 U.S. at 420. From the court's questions,

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[19] The court in *Mu'min* asked the following questions:

> Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case? . . . In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, [do you believe] that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

The court in Buchanan's case asked Mr. Hartberger the following questions:

counsel discovered the specific news media to which each juror had been exposed, if not the specific content of each article or news report he had seen or specific impressions he had gained from them. The court asked numerous questions, from different angles, about the affect [sic], if any, which exposure to pretrial publicity might have on the juror's ability to decide the case on the evidence

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> Now have you read about these cases in the newspaper? . . . And have you heard and seen about them on television? . . . [H]ave you heard anything on the radio? . . . Have you heard the case discussed by other people not in the news media?

After Mr. Hartberger answered in the affirmative to all of these questions, the court asked:

> Now, will such information as you have received from those sources affect your impartiality in this case? . . . Can you try the case based solely on the law and the evidence you hear in court? . . . And not be affected or influenced in any way by what you previously heard or read or seen about the case? . . . Have you yourself expressed or formed any opinion as to the guilt or innocence of the accused? . . . Considering what you have heard or read or seen on television about the case, do you believe that you can enter the jury box with an open mind and wait until the entire case is presented before reaching any fixed opinion or conclusion as to the guilt or innocence of the accused? . . . Do you have any doubt in your mind? . . . You can try the case based on what you hear in court? . . . Do you know of any bias or prejudice either against the Commonwealth or the accused that you might have? . . . Do you know now of any reason whatsoever why you cannot give a fair and impartial trial to the Commonwealth and to the accused based solely upon the law and the evidence in the case?

presented at trial. The court rephrased each question at least once to be sure the juror understood him and that he understood the juror's response.

After a thorough review of the transcript, this court agrees with the Virginia Supreme Court's assessment of *voir dire* in Buchanan's case:

> The trial court's questions were not leading, but were proper, fair, and evenhanded. Moreover, it appears that Buchanan's so-called open ended nonleading questions were nothing more than efforts to engage prospective jurors in rambling, unspecific, unfocused dialogues far removed from the core concern of *voir dire*, which is to determine whether jurors stand indifferent in the cause."

384 S.E.2d at 765 n.2. *See also Mu'min*, at 420. The trial court did not commit constitutional error in disallowing the tendered questions or in conducting *voir dire*. This claim must be dismissed as meritless.

Claim IXC: The trial court immediately dismissed any juror who indicated an initial reluctance to impose the death penalty without giving defense counsel opportunity to rehabilitate such jurors by exploring the issue further with them. *See Witherspoon v. Illinois*, 391 U.S. 510 (1968).

Buchanan admits that his *Witherspoon* claim was defaulted at trial. The trial court dismissed five jurors for cause, based upon their express opposition to the death penalty in response to the court's *voir dire* questions. Counsel failed to object to any of these dismissals or to

request an opportunity to rehabilitate them. Although Buchanan raised the claim on direct appeal, the Virginia Supreme Court found it barred under Rule 5:25 of the Virginia Supreme Court Rules, based on counsel's failure to rehabilitate, or otherwise object, at trial.[20] Petitioner did argue in his state *habeas* petition that counsel was ineffective during *voir dire* in making and preserving objections to specific actions by the court. Even assuming that this vague reference is sufficient to constitute exhaustion of a claim that counsel were ineffective in their handling of *Witherspoon* jurors, in order to show cause and prejudice for his default, petitioner must first prevail on the ineffectiveness claim itself, by demonstrating incompetence and resulting prejudice as defined in *Strickland v. Washington*. *Murray v. Carrier*, 477 U.S. at 487-89. As the court finds no evidence that any of the five *Witherspoon* jurors could have been rehabilitated, it is the opinion of the court that counsel were not incompetent when they did not seek to rehabilitate those jurors.

Under *Witherspoon* as slightly modified in later cases, a capital juror may be dismissed for cause only if the "juror's views would 'prevent or substantially impair the performance of his duties as a juror." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (modifying *Witherspoon* test). This determination regarding a juror's views need not be made with "unmistakable clarity"; it is sufficient if the trial judge is "left with the definite impression that a

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[20] Rule 5:25 states in relevant part:

> Error will not be sustained to any ruling of the trial court . . . unless the objection was stated with reasonable certainty at the time of the ruling.

prospective juror would be unable to faithfully and impartially apply the law." *Id*. at 426. Neither *Witherspoon* nor *Witt* indicate that the trial judge must withhold his determination about a death-opposed juror until after defense counsel has had opportunity to attempt rehabilitation of that juror. Accordingly, the court is somewhat confused by the phrasing of petitioner's claim, but will assume that petitioner's primary concern is the alleged failure of the trial court adequately to explore the *Witherspoon/Witt* question, whether through additional questions from the court or through questions by defense counsel, in order to ensure Buchanan a fair trial.

As stated, the court finds no evidence that Buchanan was denied a fair trial because the trial court did not question the *Witherspoon* jurors further about their ability to impose the death penalty despite their views against it. Based on the jurors' answers to the trial court's questions, the court is satisfied that the trial court met all *Witherspoon/Witt* requirements before dismissing the jurors.[21]

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[21] Following are relevant excerpts from the trial court's questioning of the five jurors in question.

The Court: In cases involving capital punishment, do you have any opinion such as to prevent your convicting anyone of an offense punishable with death?

. . . .

Mrs. Warrick: No.

The Court: Do you have such an opinion that you could never vote to impose the death penalty in a case? Ma'am?

Mrs. Warrick: No.

Petitioner does not here suggest any specific rehabilitation questions which should have been asked of the

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The Court:	You could never vote to impose the death penalty?
Mrs. Warrick:	No.
The Court:	You could not?
Mrs. Warrick:	No.
The Court:	All right, you're excused. . . .
The Court:	Do you have an opinion such as to prevent your convicting anyone of an offense punishable with death?
Mr. Renalds:	Yes, sir.
The Court:	In other words, if the offense of capital murder under Virginia law is punished with either death or life, if he's convicted of that offense, either a life sentence or death – so you have such an opinion of the death penalty that you would not convict someone of that offense which may be punishable with death? Is that what you say?
Mr. Renalds:	I believe so, sir.
The Court:	All right. You're excused. . . .
The Court:	First, in cases involving capital punishment, do you have any such opinion such as to prevent your convicting anyone of an offense punishable with death?
Mrs. Weigand:	I couldn't.
The Court:	So you couldn't convict anybody if the possibility was life or death?
Mrs. Weigand:	I could not convict anybody if the penalty was death.
The Court:	. . . . [Here, the court explained that capital murder cases are decided in two phases, a guilt phase and a sentencing phase where the two sentencing choices are life or death] And the

jurors before dismissal, and the court can think of none which would not have been redundant or futile; *Witherspoon* does not require the court to badger potential jurors into questioning their firm beliefs against capital punishment. Counsel could reasonably have believed that these jurors could not be rehabilitated, based on their strongly expressed views in opposition to the death penalty. Accordingly, the court finds that Buchanan has failed to demonstrate that his attorneys were incompetent in failing to object to the court's dismissal of the jurors or to

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	question I'm asking you on the guilt part of it or innocence part of it, could you vote for convicting a person of capital murder knowing that when you got to the penalty phase the penalty would either be life or death?
Mrs. Weigand:	No.
The Court:	So you could not convict anyone in a case like that? All right you're excused. . . .
The Court:	Now do you have any opinion such as would prevent your – you from convicting anyone of an offense punishable with death?
Ms. Taylor:	I don't think I could do that.
The Court:	you could not even – you could not convict somebody to begin with of such an offense even though the offense were punishable with life or death?
Ms. Taylor:	I don't think I could, no.
The Court:	So where the death penalty was one possiblity and life sentence was the only other possibility, you don't think you could convict a person of such a crime?
Ms. Taylor:	No, sir.
The Court:	Anyone have any further questions on that point? All right, you're excused, Ms. Taylor.

seek to ask their own rehabilitation questions. Where a petitioner fails to demonstrate incompetence, the court need not inquire into the prejudice prong of the *Strickland* standard; petitioner's ineffectiveness claim fails. 466 U.S. at 697. Accordingly, the court finds the *Witherspoon* claim to be procedurally defaulted and, therefore, barred from further federal review. *Harris*, 489 U.S. at 262.

Claim XA. The trial court failed to sequester the jury.

As with Claim IV, Buchanan raised Claim XA on direct appeal as a matter of state law, but did not allege that the court's omission also violated the United States Constitution or cite any federal case law. On direct appeal, the Virginia Supreme Court treated the claim as one raised under state law and found it meritless. Then, when petitioner raised the claim in state *habeas*, the Virginia Supreme Court found the federal constitutional claim concerning sequestration to be barred, pursuant to *Slayton*. 205 S.E.2d at 682. Under the same analysis as detailed under Claim IV above, the court finds federal review of this claim to be barred by petitioner's procedural default on direct appeal. *Harless*, 459 U.S. at 6-7.

Again, petitioner argues that the court should address the merits of his claim, since the state and federal claims regarding sequestration of the jury are practically identical. Even assuming that Virginia law and federal constitutional law on this issue are similar and that the claim is somehow preserved for federal *habeas* review, the court finds petitioner's claim meritless. Criminal defendants have no constitutional right to a sequestered jury, but they do have the right to a fair trial. In cases where

publicity surrounding a criminal trial is pervasive and prejudicial, the court has inherent power and even a duty to minimize the effects of the publicity on the fairness of the trial through such measures as sequestration of the jury. *See Sheppard*, 384 U.S. at 357-59. In the *Sheppard* case, the United States Supreme Court found the extent of publicity, both before and during trial, was so extreme and so pervaded the trial process that the defendant was denied his constitutional right to a fair trial. The Court specifically found that under the unique media blitz that had surrounded Sheppard's trial, the trial judge should have sequestered the jury on his own motion. *Id.* at 351. To succeed on his sequestration claim, however, Buchanan must show that failure to sequester the jury so affected the fundamental fairness of his trial as to violate due process. *Bowman v. Bordenkircher*, 522 F.2d 209, 210-11 (4th Cir. 1975). The court finds that he has not met this burden.

First, he has not presented evidence indicating that the extent of the publicity in his case reached nearly the proportions of the media interference in the *Sheppard* case or the other cases therein cited in which courts presumed prejudice from media coverage. In Sheppard's case, the media publicized the names and addresses of prospective jurors and, as a result, venire persons received anonymous letters and telephone calls, along with calls from acquaintances, about the upcoming trial. *Sheppard*, 384 U.S. at 342. Before trial, news reports emphasized evidence against Sheppard, pointed out discrepancies in his statements to police, and reported supposed "facts" about him and the case which were never brought out in trial testimony or evidence. One radio station was

allowed to set up broadcasting facilities in the room where jurors rested during court recesses and deliberated. *Id.* at 343. Newscasts originated from this room throughout the trial and during jury deliberations. Outside the courthouse, television and other cameras snapped pictures of the jury and judge; one broadcast included an interview with the judge as he came into the courthouse. Jurors were also photographed during *voir dire* and during trial. Newspapers had access to the daily record of trial proceedings and witness testimony was printed verbatim in local papers, along with objections and judicial rulings. Pictures of jurors appeared more than 40 times in local papers.

On the contrary, Buchanan has not presented to this court any direct evidence of the extent of the media coverage of his trial. In the record, the court found a photocopied article about the killings and Christianne's upcoming trial and a front page newspaper article published after her conviction for first degree murder before the same judge who would later preside over Buchanan's trial; the judge is quoted in the second article as stating that he had no doubt about Christianne's guilt on the first degree murder charges. The second article appeared four days before Buchanan's trial began.[22] Buchanan also asserts that there was daily coverage of the trial in the media, although he presents absolutely no evidence of such coverage or its specific contents.

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[22] The court notes that because Christianne Buchanan's trial was not a jury trial, she could only have been convicted if the judge felt she was guilty beyond a reasonable doubt, as the judge rendered the verdict.

Any capital murder case is bound to engender media coverage, but to prevail in his sequestration claim, Buchanan must present evidence that the coverage affected the fairness of proceedings. Buchanan does not suggest that members of the media interfered with the jurors directly, as they did in Sheppard's case. Nor does he demonstrate that any of information about the killings, which was presented by the media before and during his trial, was not also presented to the jury during trial proceedings.[23] Sequestration would not have prevented the influence the pretrial articles about the case or his wife's trial may have had on potential jurors.[24]

Furthermore, the trial court took steps to ensure that the jury remained impartial. *Voir dire* has been discussed at length above. At the end of court each day of Buchanan's trial, the trial judge admonished jurors to avoid media coverage and conversations with others about the trial. He also emphasized to the jurors that they must decide the case based only upon the evidence presented to them in the trial proceedings. On direct appeal, Buchanan asserted that "[t]here [was] no way for the court to know who the jurors talked to or what papers they read during the six days of the trial." The court finds

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[23] As indicated above, Claim VIIIA, petitioner does claim that false information about a possible financial motive behind the killings did appear in media reports. However, the court cannot consider that allegation in review of this claim or any other claim as petitioner failed to present it to the state courts.

[24] The trial court addressed the influence of this and other pretrial publicity during *voir dire*, as discussed above in the analysis of Claim VIII concerning the court's failure to grant a change of venue based on pretrial publicity.

no indication that jurors disobeyed the judge's daily admonitions concerning media coverage or that they were exposed to any prejudicial media coverage during the trial itself. Finding that petitioner has not presented any genuine issue of material fact concerning his claim that failure to sequester the jury resulted in a fundamentally unfair trial, it is the opinion of the court that no evidentiary hearing on this matter is warranted and that the claim must be dismissed as meritless.

Claim XB: The trial court failed to grant additional peremptory challenges during jury selection.

Respondent does not argue that this claim is defaulted, although petitioner failed to pose this claim specifically as a federal constitutional claim on direct appeal. Buchanan does, however, cite *Gray v. Mississippi*, 481 U.S. 648, 663 (1987), a United States Supreme Court case which addresses a constitutional claim involving, at least indirectly, additional preemptory [sic] challenges in a death penalty case. Citation of this case may be said to "fairly apprise" the Virginia Supreme Court that Buchanan was attempting to raise the claim under both Virginia law and constitutional law; therefore, the court finds this claim to be exhausted and not defaulted under *Harless*. 459 U.S. at 6-7. *See also, Renzi v. Commonwealth*, 794 F.2d 155, 158 (4th Cir. 1986)(designation of due process claim and citation of federal case sufficient to satisfy §2254 exhaustion and meet *Harless* test).

Although *Gray v. Mississippi* does provide reference to a constitutional claim regarding additional peremptory

challenges in a death penalty case, the decision is profoundly unhelpful to Buchanan. The Court in *Gray* did not find a constitutional right to additional peremptory challenges. 481 U.S. at 663. In fact, the Supreme Court found the trial court's exclusion of the venire person in *Gray* to be reversible error. *Id.* Peremptory challenges are not required by the Constitution. *Ross v. Oklahoma* 487 U.S. 81, 88 (1988). The Court in *Ross* stated that peremptory challenges should, therefore, be treated similarly to other potentially state-created rights; thus, "the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law requires." 487 U.S. at 89.

The Virginia Supreme Court has declared that "[t]here is no basis in Virginia law for additional peremptory strikes." *Buchanan*, 384 S.E.2d at 767; *See also O'Dell v. Commonwealth* 364 S.E.2d 491, 501 (Va. 1988). The trial court did not err in failing to grant additional peremptory challenges to Buchanan. Although Buchanan may have fairly apprised lower courts of a federal constitutional question concerning peremptory challenges, that question is easily answered: there is no separate federal right to peremptory challenges and Buchanan "received that which state law require[d]," in satisfaction of federal due process directives. *Ross*, 487 U.S. at 89.

Claim XI: Imposition of the death penalty constitutes cruel and unusual punishment.

This claim raising a general constitutional challenge to any imposition of the death penalty was not presented to the state courts in petitioner's previous proceedings,

and it is, thus, procedurally barred. As petitioner offers no excuse for his failure to exhaust this claim properly before the state courts, this court is also barred from review of the claim. *See Teague*, 489 U.S. at 298; *Bassette*, 915 F.2d at 935-37.

Claim XIIA: Counsel failed to advise Buchanan that he could and should plead guilty to the first degree murder indictments in order to avoid the death penalty indictments on ground of double jeopardy.

Petitioner asserts that his trial counsel was ineffective for failing to advise him to plead guilty to four indictments charging him with first degree murder.[25] Petitioner argues that under Virginia law he had an absolute right to

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[25] A total of fourteen separate indictments were returned against Buchanan. The first four alleged capital murder for killing Buchanan, Sr. and one or more of the other victims in a single transaction. Three of these indictments were later quashed as being redundant of the first. The grand jury then returned two capital murder indictments, each containing two counts which described different possible double murder transactions. Four other indictments charged petitioner with the use of a firearm in the commission of a murder. Finally, four first-degree murder indictments were returned for the individual murders of each of the victims. Petitioner was initially arraigned on the original four capital murder indictments and the four firearms indictments. He was rearraigned just before trial on three capital murder indictments, four firearms indictments, and four first-degree indictments. Petitioner now asserts that he should have been advised to plead guilty to the four first-degree murder indictments and that by doing so, the Commonwealth would have been barred, on double jeopardy grounds, from prosecuting the capital murder indictments.

plead guilty to the whole of any of the indictments against him. If Buchanan had entered a guilty plea to the indictments charging him with first degree murder, he believes, double jeopardy would have prevented the Commonwealth from prosecuting him on the capital charges. The Commonwealth responds that petitioner's understanding of the double jeopardy implications of a guilty plea is faulty in this case, where the indictments on first degree murder and those on capital murder were tried in a single proceeding. Although the court recognizes that the merits of petitioner's double jeopardy argument in the plea context are unclear under current Virginia law, it is of the opinion that counsel were not ineffective for failing to raise this issue or in failing to advise Buchanan to plead guilty at the time this case was tried.

At the outset, it is important to note the standards governing an ineffective assistance of counsel claim. The sixth amendment guarantees the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the United States Supreme Court adopted a two-prong test for determining whether a defendant was denied effective assistance. The first prong is incompetence. Petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 688. A strong presumption exists that the defendant's counsel acted within his professional discretion and provided reasonable service. A reviewing court will be highly deferential in scrutinizing the performance of counsel. *Id.* at 688-89; *Bunch v. Thompson*, 949 F.2d 1354, 1364 (4th Cir. 1991), *cert. denied*, ___ U.S. ___

(1992)(best course for *habeas* court is to credit trial counsel's plausible strategic choices).

The second prong of the *Strickland* test is prejudice. The *habeas* petitioner must be able to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, at 694; *see Hutchins v. Garrison*, 724 F.2d 1425, 1431 (4th Cir. 1983) (burden on petitioner to show prejudice), *cert. denied*, 464 U.S. 1065 (1984); *Goodson v. United States*, 564 F.2d 1071, 1072 (4th Cir. 1977) (incorrect advice or trial error must be prejudicial).

In this case, determining whether Buchanan was prejudiced by counsel's actions requires an examination of the underlying merits of petitioner's double jeopardy argument. In support of his position, petitioner first points to the case of *Graham v. Commonwealth*, 397 S.E.2d 270, 271 (Va.App. 1990), in which the Virginia Court of Appeals held that the Virginia constitution and laws give a criminal defendant the absolute right to plead guilty to the whole of any indictment against him. The court may reject such a guilty plea only if it believes that the plea was not made intelligently, voluntarily, and knowingly, in accordance with federal Constitutional requirements. *Id.* at 273.[26] Petitioner next relies upon several Virginia state

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[26] In *Graham*, the defendant was charged in a single indictment and initially entered a plea of not guilty. After the Commonwealth had presented its evidence at trial, however, the defendant informed the court that he wished to change his plea to guilty. The court refused to accept the plea, saying that

and federal cases which hold that a guilty plea is the equivalent of a conviction. *See Kercheval v. United States*, 274 U.S. 220, 223 (1927) (guilty plea is a conviction, and like a jury verdict, is conclusive); *Knight v. Johnson*, 529 F.Supp. 1309, 1322 (E.D.Va. 1982) (court should not have required defendant to go through full trial after accepting guilty plea), *rev'd* 699 F.2d 162 (4th Cir. 1983) (court entitled to hear all evidence necessary to understand the case and affix an appropriate sentence), *cert. denied* 464 U.S. 832 (1983); *Hancock v. Slayton*, 341 F.Supp. 436, 439 (W.D.Va. 1972) (because guilty plea is a self-imposed conviction, defendant usually cannot appeal unless it appears the plea was coerced); *Miracle v. Peyton*, 176 S.E.2d 339, 341 (Va. 1970) (a voluntary plea of guilty is a conviction and nothing is left but the imposition of the prescribed punishment). Finally, Buchanan notes that the double jeopardy clause embodies three guarantees, including protection against a second prosecution for the same offense after a conviction. *See North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Based on these principles, he argues that had he pled guilty to the first degree murder indictments, the trial court would have been required to accept his plea, and that conviction would have precluded the Commonwealth from prosecuting the capital murder indictments on double jeopardy grounds.

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the defendant's offer cam too late. 397 S.E.2d at 272. The Court of Appeals reversed, noting that while the United States Constitution did not provide a defendant with the absolute right to plead guilty, The Virginia Constitution and Virginia Code § 19.2-254 did grant defendants that right. *Id.*

The Commonwealth responds that Buchanan's understanding of double jeopardy in this situation is erroneous, and asserts that the United States Supreme Court's decision in *Ohio v. Johnson*, 467 U.S. 493 (1984), is controlling. In that case, the defendant attempted to plead guilty to several counts of a single indictment. The trial court accepted the guilty pleas to counts that were lesser included offenses of other crimes charged in the indictment, and then granted the defendant's motion to dismiss the remaining charges, reasoning that prosecution of those charges would be barred by double jeopardy. The Supreme Court reversed, stating that the double jeopardy clause was not implicated by continuing prosecution of the charges remaining in the indictment. The Court explained that the defendant had not yet been exposed to conviction on the charges to which he had pled not guilty, and the state had not had the opportunity to marshal its evidence or resources more than once. *Id.* at 501. In conclusion, the Court stated: "[n]otwithstanding the trial court's acceptance of respondent's guilty pleas, respondent should not be entitled to use the Double Jeopardy Clause as a sword to prevent the state from completing its prosecution on the remaining charges." *Id.* at 502.

The Commonwealth also points to the decision of the Virginia Court of Appeals in *Rea v. Commonwealth*, 421 S.E.2d 464 (Va.App. 1992). The procedural facts of that case are remarkably similar to the case at hand. The defendant in *Rea* was charged in multiple indictments of first degree murder and capital murder. When arraigned on all of the charges, the defendant pled guilty to three first-degree murder indictments, and not guilty to the

remaining charges, including three counts of capital murder. *Id.* at 466. The court found the guilty pleas to be proper, but decided to defer consideration of the pleas and submit the remaining charges to the jury. *Id.* The jury convicted the defendant of three capital murders, and the trial judge then convicted the defendant, based on his guilty pleas, of three first degree murders.[27] *Id.* The defendant was sentenced to imprisonment for nine life terms plus forty-seven years. On appeal, the court held that double jeopardy protected the defendant from multiple punishments for the same crime and vacated the three first degree convictions and sentences. *Id.* at 468. The defendant also argued on appeal that the court erred by withholding judgment on the guilty pleas, because acceptance of those pleas would have barred the Commonwealth from prosecuting the capital murder charges. *Id.* at 467. The Court of Appeals rejected this contention, however, noting that the defendant had been arraigned on all of the indictments on the same day: "By electing to plead guilty to three charges and not guilty to the remainder, defendant neither 'transformed the single prosecution into two separate prosecutions nor captured for

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[27] In entering the first degree murder convictions based upon the defendant's guilty pleas, the trial court noted that "there were only three victims . . . and accordingly there can only . . . be three convictions of homicide. But . . . this is a case of first impression in . . . Virginia . . . and the Court believes that the matter should be resolved by the Appellate Court *as to the issue of whether his pleas of guilty to first degree murder . . . actually placed him in jeopardy of the capital murder convictions.* And, of course, the Appellate Court [may] vacate the convictions [it] finds . . . [in]appropriate." *Rea*, 421 S.E.2d at 466 n.1 (emphasis added).

himself any special protections against successive prosecutions under the double jeopardy clause.' " *Id.* (citing *Walker v. Commonwealth*, 415 S.E.2d 446, 447 (Va.App. 1992)) (other citations omitted). The court concluded that the defendant's multiple convictions were obtained in a single trial and therefore were not barred by double jeopardy. *Id.* Where multiple convictions are obtained in a single proceeding, only the double jeopardy guarantee against multiple punishments is implicated. *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (where consecutive sentences are imposed at a single criminal trial, the double jeopardy guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense); *Turner v. Commonwealth*, 273 S.E.2d 36, 46-47 (Va. 1980).

Assuming that *Rea* is currently the controlling state law for the facts of the case at hand,[28] Voir dire cannot legitimately argue that he was prejudiced by counsel's failure to suggest a guilty plea on the first-degree murder indictments. *Rea*, along with *Ohio v. Johnson*, suggests that even if petitioner had attempted to plead guilty to the first degree murder indictments, the court would have allowed the Commonwealth to prosecute the capital charges.

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[28] As the *Rea* court made no reference to its previous decision in *Graham*, it is unclear what force the *Graham* holding may have outside of the context of a single indictment. In *Sullivan v. Commonwealth*, 420 S.E.2d 724 (Va.App. 1992), *on rehearing* 433 S.E.2d 508 (Va.App. 1993), the defendant raised a double jeopardy argument similar to the one advocated here. The court did not reach a decision on the issue, however, as they were able to decide the case on other grounds.

Perhaps more importantly, the court notes that neither the *Graham* nor *Rea* decision had been rendered at the time Buchanan was tried. The double jeopardy argument now raised by petitioner in his request for *habeas* relief had no foundation at the time his trial counsel were preparing his defense. Counsel could not have predicted whether the trial court would have accepted the reasoning later adopted in *Graham*, or followed the procedure approved in *Rea*. Indeed, as the Commonwealth points out, *Ohio v. Johnson* was the controlling case on this issue at the time of trial. Based on the principle articulated in that case, counsel could legitimately have believed that a guilty plea by Buchanan would not prevent the Commonwealth from prosecuting the capital murder charges. According to objective measures of reasonableness, then, the court believes that it was not incompetent for petitioner's trial counsel to fail to anticipate an argument that may have been asserted following the rule announced in *Graham*. *See Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) (case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law). Since the issue of prejudice is at best unclear, and because the court does not believe counsel acted improperly, Buchanan has failed to meet either prong of the *Strickland* test and is not entitled to relief on this claim.

Claim XIIB: Counsel failed to object to the penalty phase jury instruction regarding "vileness" or to submit their own instruction providing a constitutionally adequate vileness.

This claim was not presented to the state courts in Buchanan's previous proceedings and it is, thus, procedurally barred. As petitioner offers no viable excuse for his default of state procedural rules for appeal and *habeas*, this court is also barred from review of the claim. *Teague*, 489 U.S. at 298; *Bassette*, 915 F.2d at 935-37.

Claim XIIC: Counsel failed to move for the trial judge to recuse himself from presiding over Buchanan's trial even after the judge was quoted in the newspaper four days before trial as stating that he believed Christianne Buchanan to be guilty of first degree murder; counsel intended to seek an instruction for second degree murder and the judge's comment before trial should have warned them that he would not grant such an instruction, as indeed he did not.

Buchanan believes that recusal was warranted because the same judge who sat on the bench for petitioner's trial also presided over the trial of petitioner's wife, Christianne Buchanan. Petitioner further claims that the trial judge was quoted in the local newspaper, just days before petitioner's trial began, stating that the jury was justified in finding Christianne Buchanan guilty of first degree murder.

In order to prevail on an ineffective assistance of counsel claim Buchanan would have to show both that his counsel was ineffective and that some prejudice resulted from counsel's defective performance. *Strickland*, 466 U.S. at 687. A justified contention of actual prejudice is therefore, necessary to successfully make out an ineffective assistance of counsel claim. In his state *habeas* petition, petitioner claimed that prejudice attached to his trial because the judge seated jurors who were aware of the publicity and predisposed to reject petitioner's evidence that he was only guilty of second degree murder. That however, is not the assignment of prejudice that petitioner claims in his federal *habeas* petition. Now Buchanan asserts that the trial judge showed his own predisposition to disregard the evidence of second degree murder and prejudice resulted when the trial judge refused to give a second degree murder instruction to the jury.

Such inconsistencies between state and federal collateral appeal petitions lead to a factual default of petitioner's federal declaration of prejudice. *See Keeney*, 504 U.S. at 8. Though both the federal and state *habeas* petition ineffective assistance of counsel claims revolve around the trial judge's statement to the press following Christianne Buchanan's trial and an allegation that the statement somehow prejudiced Buchanan's attempt to argue second degree murder, the allegations of prejudice are quite different. The state petition pointed to the jury as the cause of the problem, and now petitioner raises concerns about the judge's own state of mind. Without any proper claim of prejudice, this claim raised by petitioner fails on its face.

However, even if the claim were not defaulted or if some part of it survived default, petitioner's allegations here would fail on their merits. First of all, as stated earlier, the facts surrounding the murders of Buchanan's father, step-mother, and half-brothers simply did not warrant a second degree murder instruction. Petitioner simply cannot avoid the fact that consideration of a second degree murder conviction was not warranted by either the judge or the jury. Further, by making a statement to the press regarding Christianne Buchanan's guilt the trial judge was not making any determination about petitioner's guilt and petitioner does not claim that the trial judge failed to instruct the jury about considering *only* evidence presented during his trial, nor does petitioner bring forth any evidence to show that the jury was actually tainted by the judge's pre-trial statement regarding Christianne Buchanan's guilt.

With regard to petitioner's claim that his trial was one warranting recusal in the first instance, the court notes that a judge is assumed not to confuse evidence in one trial before him with facts presented in another case. *See Dove v. Peyton*, 343 F.2d 210, 214 (4th Cir. 1965). If petitioner's contention held any weight, judicial recusal would be required in any set of cases in which multiple defendants were tried separately and such a far sweeping rule has never been adopted by any court. *See id.* In addition, matters of judicial bias arising from public interest in a case are largely matters of state legislative concern and generally do not rise to the level of federal constitutional proportions. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986).

If Buchanan had any basis for seeking his trial judge's recusal based on the facts presented, it would have arisen under Virginia statutory or case law. In Virginia, judicial recusal is almost always a matter of discretion. *Justus v. Commonwealth*, 283 S.E.2d 905, 908 (Va. 1981), *cert. denied*, 455 U.S. 983 (1982), and public attention to a case is not a sufficient reason to warrant judicial recusal even when public pressure seeking the death penalty is brought to bear on the judge. *Royal v. Commonwealth*, 458 S.E.2d 575, 580 (Va. 1995).

Petitioner cannot make out any claim here. The proper application of *Keeney* leaves him without a declaration of prejudice on which to base his ineffective assistance of counsel claim. However, even if petitioner were left with any sort of contention that the trial judge's statement to the press regarding Christianne Buchanan's conviction somehow, in and of itself, prejudiced his own trial, whether because of the judge's actions or the jury's, that claim is completely insupportable on the merits as set forth above.

Claim XIID: Counsel prejudiced Buchanan's position on appeal by stating that some jurors were "acceptable" to Buchanan after the court had overruled counsel's objections to those jurors.

Buchanan claims that as a result of counsel's acceptance of the jury, some jurors were "improperly seated" and that counsel's waiver prejudiced his appeal to the Virginia Supreme Court. This allegation is meritless. As direct support for his claim of improperly seated jurors,

petitioner points to Juror Cecil Banton. However, this juror was not among the fourteen venire persons ultimately seated on the jury (Tr. 609),[29] and there is no indication in the record that he, or any person who actually became part of the seated jury, would automatically "vote for death if given a choice of punishments," as Buchanan alleges in his petition. In fact, Mr. Banton, in response to questioning by the defense counsel, said "I would follow the court and make up my own mind." (Tr. 133). Further, James Jedelsky was the only juror who actually indicated he might "vote for death" in the fashion contended by Buchanan in his petition. Mr. Jedelsky was excused for cause by the trial judge because he exhibited a strong feeling in support of the death penalty and indicated he might inject his feelings about the escalating crime rate into petitioner's trial (Tr. 545-46). Thus, the court finds no indication that any seated jurors were unacceptable in the manner petitioner alleges and, accordingly, that counsel were not ineffective for stating, in the jurors' presence, that the jury was "acceptable." *See Strickland*, 466 U.S. at 689 (court will be deferential to

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[29] Counsel for defense used a peremptory challenge to remove Juror Banton from the venire. Petitioner argues in his *habeas* pleadings that "it is prejudicial error [under Virginia law] for the trial court to force a defendant to use the peremptory strike afforded him . . . to exclude a venireman who is not free from exception." *Justus v. Commonwealth*, 266 S.E.2d 87, 90 (Va. 1980). Yet, Buchanan's present claim focuses on counsel's ineffectiveness in failing to make and preserve objections to the jurors in the first place, not upon the errors of the trial court. Thus, the court will not address the court's alleged error in regards to the use of a peremptory challenge to remove Mr. Banton.

performance of counsel in order to balance distorting effects of hindsight).

In addition, counsel's decision to state that jurors were acceptable to Buchanan was part of a tactical strategy. Counsel had contacted the National Association of Criminal Defense Lawyers and the Southern Poverty Law Center before Buchanan's trial to ask for advice about defending a capital murder trial. The materials these organizations provided to Buchanan's counsel included a recommendation that the defendant should participate in selection of jurors and that jurors to whom counsel had previously objected should be told directly that the defendant "accepts" them as jurors to try his case, in an effort to encourage jurors' commitment to a fair evaluation of the evidence. Petitioner argues that this strategy had no factual basis because the jurors themselves had not heard counsel's previous objections. The court finds the strategy to be a reasonable attempt to influence the jury toward fairness in Buchanan's case. In any event, the court cannot second-guess a reasonable strategic decision by counsel, *see Stamper v. Muncie*, 944 F.2d 170, 177-78 (4th Cir. 1991), especially where the court finds no indication that Buchanan's right to an impartial jury was prejudiced in any way by counsel's statement. This claim must be dismissed as meritless.

Claim XIIE: Counsel stated publicly, prior to trial, that Buchanan was guilty either of capital murder or of first degree murder.

Counsel's statement allegedly made on April 26, 1988, the day the trial began, that Buchanan was guilty of

either capital or first degree murder, does not make out an ineffective assistance of counsel claim. Buchanan asserts that counsel's statement before trial, which was quoted in the papers, could have prejudiced the non-sequestered jury and denied him a fair trial. Petitioner essentially argues that he was entitled to have the jury consider a second degree murder charge, *see supra*, and counsel's statement made on the eve of trial prejudiced the jury against making such a determination. There are two ways the alleged prejudice may have attached to petitioner's trial: 1) the jury may have decided the case based on the pre-trial statements of counsel, not the evidence presented during the case, or 2) counsel's statement may have prejudiced the defendant's request for a second degree murder charge. First, the record clearly demonstrates that the defense, in its opening statement, explained that petitioner killed his family (Tr. at 639-55). At the conclusion of the opening statement the defense attorney explained that if each murder was separate from the others and not part of the same transaction, they should come back with four first degree murder verdicts. Thus, even if the jurors were aware of counsel's alleged pre-trial statement to the press, they heard essentially the same thing during defense counsel's opening address and there was no resulting prejudice.

Nor can petitioner show any prejudice attached to his request for a second degree murder charge as a result of his counsel's pre-trial statement. As noted in the analysis of Claim IV, the trial court determined that Buchanan was not entitled to a second degree murder based on the evidence presented at trial. This court agrees with the

trial court and the Virginia Supreme Court's determination that there were no significant facts supporting giving the lesser charge. *Buchanan*, 384 S.E.2d at 769; *Hopper v. Evans*, 456 U.S. at 611 (Virginia and federal standard both require instructions on lesser included offenses only where evidence supports a rational finding of that offense by factfinder). In Virginia, a criminal defendant "is not entitled to a lesser degree instruction solely because the case is one of murder." *Clark v. Commonwealth*, 257 S.E.2d 784, 789 (1979), *cert. denied*, 444 U.S. 1049 (1980). Neither the law of Virginia, nor the facts, supported giving a second degree murder instruction to the jury. Thus, Buchanan has failed to make an adequate showing of prejudice on either ground and is not entitled to relief on Claim XIIE.

Claim XIIF: Counsel failed to object to the Commonwealth's Attorney prosecuting Buchanan although he had represented Buchanan's grandparents in 1984 in a suit seeking visitation with Buchanan and had further represented Buchanan himself as a juvenile.

Petitioner also argues that his trial counsel was ineffective for failing to object to Mr. Meeks' prosecution of the case. The Commonwealth Attorney had previously represented Buchanan's grandparents against his father in contested visitation proceedings involving Buchanan in 1984 (2/17/94 Tr. 1).[30] The grandparents alleged during the custody proceeding that petitioner was being

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[30] Although petitioner claims that the Commonwealth's Attorney, Mr. Meeks, represented him in juvenile court when he

abused and that led him to run away from home on several occasions. Mr. Meeks explained the situation to the trial judge and to petitioner's trial counsel. Buchanan's trial counsel examined the record and determined that there was no conflict and the trial judge did not perceive a problem with Mr. Meeks' representation of the Commonwealth (2/17/88 Tr. 2).

This court cannot say that the defense counsel's acceptance of Mr. Meeks' representation of the people constituted anything other than valid trial strategy under *Strickland*. In addition, while a prosecutor's participation in a case has been found prejudicial if he has represented the defendant in the past, *See United States v. Schell*, 775 F.2d 559, 565 (4th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986), Mr. Meeks' role in legal proceedings involving Buchanan was much more attenuated and did not rise to the level of constitutional concern. If anything, counsel could reasonably have believed that the Commonwealth Attorney's awareness of petitioner's difficult childhood would only help Buchanan's situation. Douglas Buchanan admitted to killing his family and only wished to persuade the jury that the killings were: 1) a set of separate occurrences and not one "transaction," and 2) committed in the heat of passion. In order to prove the latter during the sentencing phase, Buchanan put on evidence about his mother's death and his stepmother's treatment of

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was a runaway, state *habeas* proceedings indicated that Meeks' representation of Buchanan's maternal grandparents was his only professional connection to Buchanan's previous court appearances. Buchanan offers no evidence to the contrary in his present petition.

him. Mr. Meeks was aware of all that and the sympathy such knowledge would engender could only have helped petitioner at trial.

Further, the only specific "fact" of prejudice which petitioner brings forth deals with Mr. Meeks' cross examination of Buchanan's aunt, Audrey Bowling, at the change of venue motion of February 17, 1988. Ms. Bowling was testifying regarding the adverse publicity the case had received and appeared as a witness for the defense in favor of changing venue. (2/17/88 Tr. 5-14). However, Mr. Meeks asked only one question which had anything to do with the prior custody disputes: "Weren't you a participant in the custody – in the fight for the custody, I believe you were a witness in that, weren't you?" (2/17/88 Tr. 12). That inquiry was intended only to bring out Ms. Bowling's bias in favor of her nephew and could have been asked by any other Commonwealth's attorney. Mr. Meeks' participation in the earlier custody dispute simply did not provide him with a "leg up" in Ms. Bowling's examination, as petitioner alleges. According to petitioner's own statement of the arguments supporting this court's grant of the writ, then, this court can find no prejudice under *Strickland* because Mr. Meeks' cross examination of Ms. Bowling at the change of venue motion was not substantially enhanced by his previous representation of Buchanan's grandparents in the custody dispute. 466 U.S. at 689.

Claim XIIG(1): Counsel failed to move for a mistrial in the penalty phase when it became known that an expert witness from Central State Hospital had tape recorded an interview with Buchanan; in addition, counsel failed to request a copy of the tape for possible use in mitigation.

This claim was not presented to the state courts in Buchanan's previous proceedings and it is, thus, procedurally barred. As petitioner offers no excuse for his failure to exhaust this claim properly before the state courts, this court is also barred from review of the claim. *See Teague*, 489 U.S. at 298; *Bassette*, 915 F.2d at 935-37.

Claim XIIG(2): Counsel failed to preserve their objection to the trial court's order requiring submission of the report of defense psychiatrist Dr. Brown to the Commonwealth's expert witness and failed to demand simultaneous exchange with the report of the Commonwealth's expert witness.

Buchanan also asserts that his counsel were ineffective in failing to object to the trial court's order that the report of defense psychiatrist Dr. Robert Brown be turned over to the Commonwealth and its expert witnesses prior to the sentencing phase of his trial. Buchanan also complains that his counsel failed to demand a simultaneous exchange with the report of the Commonwealth's expert witnesses.

The same standards for determining ineffective assistance of counsel applicable to trial also apply to claims of ineffective assistance at the penalty phase of a capital trial. *Strickland*, 466 U.S. at 686. Accordingly, assessing the conduct of counsel here requires an effort to eliminate the distorting effects of hindsight, and an attempt to understand the conduct from the attorneys' perspective at the time their decisions were made. *Id.* at 689. Buchanan has the burden of showing that the actions of counsel were both incompetent and prejudicial according to the *Strickland* interpretation of those terms.

The Commonwealth establishes that the conduct of petitioner's trial counsel was neither incompetent nor prejudicial. Respondent points to Va. Code Ann. §19.2-264.3:1D, which requires a criminal defendant who wishes to present psychiatric or psychological evidence as a mitigating consideration during the penalty phase of a capital murder trial to provide the Commonwealth "the report and the results of any other evaluation of the defendant's mental condition conducted relative to the sentencing proceeding and copies of psychiatric, psychological, medical or other records obtained during the course of such evaluation. . . . " Likewise, subsection F of Virginia Code section 19.2-264.3:1 requires a criminal defendant who wishes to use psychiatric evidence to submit to an evaluation by experts for the Commonwealth. After the Commonwealth's experts perform their evaluations, they are required to report their findings to the attorneys for the Commonwealth and for the defense. Va. Code Ann. § 19.2-264.3:1F(1).

The actions of defense counsel in the present case demonstrate that they were aware of the provisions of the

Virginia statute and reasonably assumed that an objection to the trial court's order to turn over Dr. Brown's report would easily be overruled. Also, the record indicates that the Commonwealth did request its experts to conduct an evaluation of the defendant, and that the experts sent their findings to the Commonwealth's Attorney and to the attorneys for the defendant approximately one week before the sentencing phase of the trial was conducted. The actions by the court, the Commonwealth, and Buchanan's trial attorneys show that all parties complied with the law of Virginia. Buchanan's arguments that his attorneys were incompetent in failing to do otherwise is without merit. Further, given the circumstances and the requirements of Virginia law, petitioner cannot effectively argue that he was prejudiced by the conduct of his trial counsel on this issue. Petitioner is not entitled to *habeas* relief based on this claim.

Claim XIIH: Counsel failed to obtain the written guilt phase verdict for study prior to the penalty phase and so was not in a position to object effectively to the verdict on the form as logically inconsistent.

The court finds that Buchanan was not deprived of adequate representation because of his attorneys' alleged failure to obtain the written guilt phase verdicts before the sentencing phase of the bifurcated trial commenced. Apparently, petitioner harkens back to the fact that the trial jury found him guilty of *both* the single capital murder of Douglas McArthur Buchanan, Sr., Joel Jerry Buchanan, Christopher Donald Buchanan, and Geraldine Patterson Buchanan, as well as four first degree murders

for each of the victims individually. Buchanan contends that the jury's verdict violated his Fifth Amendment right to be free from multiple punishments for the same offense. Counsel's alleged ineffectiveness is contended to have arisen from petitioner's trial counsel failing to cure the verdict "defect" before Buchanan was sentenced to death by the jury.

Any defect resulting from petitioner's conviction of both the greater capital offense and the lesser murder charges was cured by the courts of the Commonwealth. *See Buchanan,* 384 S.E.2d at 772. Petitioner was simply never entitled, at any time, to pick and choose among the several jury verdicts – "keeping" the first degree murder convictions and "throwing out" the one for capital murder. When a defendant is convicted of lesser included offenses and a greater offense at the same trial, the proper remedy under Virginia and federal law is to vacate both the conviction and sentence of the lesser included offense while leaving in place the conviction for the greater crime. *Brown v. Commonwealth,* 279 S.E.2d 142, 145 (Va. 1981), *citing United States v. Buckley,* 586 F.2d 498, 505 (5th Cir. 1979). The Virginia Supreme Court has already corrected the situation by vacating the first degree murder conviction for the killing of petitioner's father. *Buchanan,* 384 S.E.2d at 773. Thus, even if everything Buchanan contends is true about counsel's deficient performance, the correction made by the state supreme court leads to the conclusion that petitioner has suffered no prejudice under *Strickland.*

Claim XIIIA: The trial court denied additional neurological testing, thus denying Buchanan possible mitigation evidence related to his head injury.

At the end of his petition, Buchanan alleges that the court and the prosecution committed several other constitutional violations. Included in these claims is petitioner's assertion that the trial court violated his sixth, eighth, and fourteenth amendment rights when it refused to allow petitioner to undergo additional neurological testing following the trial and sentencing phase of the capital murder conviction. Specifically, Buchanan sought at his sentencing hearing[31] to be tested for a rare form of epilepsy that some psychologists believe may be linked to abnormal and violent behavior in young people. He now claims that the trial court's denial of his request to undergo testing for this particular disorder unconstitutionally deprived him of potential mitigating evidence.

The Commonwealth retorts that a criminal defendant does not have a federal constitutional or state statutory right to "shop around" for an expert that will present the most favorable opinions. *See Pruett v. Thompson*, 771

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31 Buchanan's sentencing hearing was conducted on August 19, 1988. At that time, the court considered the pre-sentencing report that was prepared for all the convictions other than the capital murder conviction, and the post-sentencing report regarding the capital murder conviction. Petitioner's trial counsel presented a motion for additional neurological testing, arguing that the court's ruling on the motion could affect its consideration of both the pre-sentencing and the post-sentencing reports.

F.Supp. 1428, 1441 (E.D.Va. 1991); *see also Poyner v. Murray*, 964 F.2d 1404, 1418-20 (4th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 419 (1992) (attorney's failure to look for psychiatrist willing to testify to psychological disorder does not constitute ineffective assistance). The government also explains that in this case, Buchanan underwent a complete neurological examination and diagnosis prior to his trial. Petitioner's request for additional testing was based upon an article in the *American Journal of Psychiatry* that was published shortly after his sentencing. The article was admitted into evidence during petitioner's sentencing hearing. Petitioner's psychiatric expert also testified at the sentencing hearing that the opinion expressed in the article – the idea that temporal lobe epilepsy may produce violent behavior in young people – is a controversial position among experts on epilepsy. Given this background, the Commonwealth asserts that the issue presented by petitioner is an evidentiary matter only, and does not raise a federal or constitutional issue.

Petitioner argues that he should have the opportunity to present all of the possible mitigation evidence available to him. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, J.) (because the death penalty is qualitatively different than other forms of punishment, the sentencer should not be precluded from considering any aspect of the defendant's character, record, or circumstances of the offense as a mitigating factor). Petitioner also relies upon *Ake v. Oklahoma*, 470 U.S. 68 (1985) in asserting that the court's refusal to permit the additional psychological testing was a violation of constitutional rights.

The *Ake* case, however, involved circumstances markedly different from petitioner's situation. In that case, the defendant was suspected of suffering from a severe mental illness. Following the defendant's arraignment, the court ordered him to be examined by a psychiatrist to determine whether he was competent to stand trial. 470 U.S. at 71. The defendant was initially deemed incompetent to stand trial, but when a course of drug treatment was administered, the defendant stabilized and proceedings against him were resumed. *Id.* at 71-72. The defendant's attorney informed the court that he wished to pursue an insanity defense, and requested that the court arrange for a psychiatrist to examine the defendant. *Id.* at 72. The trial court refused, and the defendant was convicted of two counts of first degree murder and two counts of shooting with the intent to kill. *Id.* at 72-73. At the sentencing phase, the government presented the testimony of the state psychiatrists who had conducted the initial examination of the defendant following the killings. Those experts testified as to the defendant's future dangerousness. The defendant did not have expert psychiatric testimony to rebut this evidence or to present evidence in mitigation. *Id.* at 73. The United States Supreme Court took up the issue of whether the defendant should have been provided with a psychiatric examination on the defendant's direct appeal. The Court reversed the conviction, holding that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." *Id.* at 74. In arriving at its

conclusion, the Court reasoned that criminal defendants should have a fair opportunity to present his defense, and that a state's interest in conserving state funds should not come at the expense of fair and accurate criminal proceedings. *Id.* at 83. The Court did limit its holding, however, to cases in which the defendant's mental condition is seriously in question. *Id.* Where the defendant's mental condition is at issue, the Court found that the defendant should be "fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination."

In the present case, the court is of the opinion that the requirements of *Ake* were met when Buchanan received a complete psychiatric examination and diagnosis before going to trial. The psychiatric assistance provided to Buchanan allowed him to determine the viability of an insanity defense, and permitted him a fair opportunity to present mitigating evidence during the sentencing phase of his trial. *Ake* does not require the state to provide criminal defendants with unlimited opportunities to explore any and every psychological condition that could potentially produce mitigating evidence.[32] In this case, the court believes that Buchanan had

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[32] In fact, the *Ake* Court specifically determined that its "concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel, we leave to the States the decision on how to implement this right." 470 U.S. at 83. In this case, the Virginia Supreme Court determined on direct review that the trial court did not abuse its discretion in denying additional testing; this court assumes that this decision reflects the law of Virginia.

a fair opportunity to present the jury with enough evidence of his mental condition to allow it to make a reasonable determination of sentence.

Also as part of this claim, petitioner makes the bald assertion that the trial court denied him his constitutional rights by refusing to allow Dr. Jerome G. Miller to testify as to the interviews he had conducted in preparing his evaluation of Buchanan. The court also refused to allow Dr. Miller to testify on the medical positions and writings of Dr. Jonathan H. Pincus, who authored the article in the *American Journal of Psychiatry* about the potential effects of temporal lobe epilepsy, and refused to admit letters written to Dr. Miller from Dr. Pincus and Dr. Breeshire. Buchanan argues that, as a result, he was unconstitutionally denied the right to present mitigating evidence at his sentencing hearing. The record reflects, however, that both Dr. Miller and Dr. Brown were allowed to testify as to their observations about Buchanan and to give their opinions on whether additional testing was likely to uncover further mitigating evidence. The evidence that was excluded by the trial court consisted of hearsay statements and the opinions of other doctors who had never examined petitioner. The court is of the opinion that this evidence was not itself evidence of mitigation, and that Buchanan was able to present all the reliable and relevant mitigation available to him at the sentencing hearing. The trial court's evidentiary decisions in this case did not deprive petitioner of his constitutional rights.

Claim XIIIB: The trial court refused to instruct the jury that if Buchanan was sentenced to life, he would not be eligible for parole, if at all, for a very long time.

Buchanan raises this claim under the Eighth Amendment, which bars arbitrary and capricious imposition of the death penalty and prohibits procedures which needlessly undermine the reliability of the capital sentencing process. *See Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (special need for reliability in capital case; *Beck v. Alabama*, 447 U.S. 625, 638 (1980); *Gregg*, 428 U.S. at 189. Buchanan argues that withholding information about his parole eligibility left the jury with a distorted view of the penalty choices, making their decision for death unreliable.[33] In the absence of the requested instruction, he contends, the jury could have formed the impression that if they did not sentence Buchanan to death, he would soon be out in society again.

The court finds no merit to Buchanan's Eighth Amendment claim. The United States Supreme Court has held that federal courts generally must defer to a state's determination about what a jury should and should not be told at sentencing about the defendant's prospects for parole, pardon or sentence commutation. *California v. Ramos*, 463 U.S. 992, 1013-14 (1983). And as the Virginia

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[33] Had Buchanan received four life sentences for the murders under the law in force at the time of the killings, he would likely not have been eligible for parole consideration until he had served at least twenty years in prison. *See* Va. Code Ann. §53.1-151(D).

Supreme Court noted in affirming Buchanan's death sentence on direct appeal, Virginia juries are to impose an appropriate sentence under the applicable criminal statutes without regard for what might happen to that sentence later, such as possible sentence commutation or parole release. *Buchanan*, 384 S.E.2d at 774. *See also Poyner v. Commonwealth*, 329 S.E.2d 815, 828, (Va.), *cert. denied*, 474 U.S. 865 (1985); *Turner v. Commonwealth*, 273 S.E.2d 36, 47 (Va. 1980). This Virginia rule precluding jury consideration of parole in sentencing has been upheld by the United States Court of Appeals for the Fourth Circuit against constitutional challenge in cases similar to Buchanan's.[34] *See Peterson v. Murray*, 904 F.2d 882, 886-87 (4th Cir.), *cert. denied*, 498 U.S. 992 (1990) and *Turner v.*

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[34] In their discussions of this claim, both parties have mentioned *Simmons v. California*, 114 S.Ct. 2187 (1994). The court does not find this case to be controlling of the relevant issues in Buchanan's case. Although the United States Supreme Court, in *Simmons*, recognized a limited, due process right to a parole ineligibility instruction in capital sentencing, only two justices on the *Simmons* court would have found an Eighth Amendment right to the instruction in all death penalty cases, while six justices noted the continued viability of *California v. Ramos* and the right of the state in most cases to determine proper jury instructions on parole eligibility. 114 S.Ct. at 2196, 2200 (O'Connor, J., concurring).

Buchanan's case is also factually distinguishable from *Simmons*. If sentenced to life instead of death, Simmons would never have been eligible for parole, and the jury specifically found future dangerousness as the aggravating factor making Simmons eligible for the death sentence. *Simmons*, 114 S.Ct. at 2190-91. Buchanan, on the other hand, would have been eligible for parole in approximately thirty years on multiple life sentences, and the jury in his case was not even instructed on future dangerousness as a possible aggravating factor.

Bass, 753 F.2d 342, 354 (4th Cir. 1985), *rev'd on other grounds sub nom Turner v. Murray*, 476 U.S. 28 (1986).

In any event, the court finds no basis upon which the jury was misled by the lack of the desired instruction in Buchanan's case. Had the jury sentenced Buchanan to life instead of death, he *would* have been eligible for parole and, although twenty years imprisonment is a long time, he was a young man at the time of sentencing, only twenty years old. The common sense interpretation of "life sentence" left to the jury in the absence of a specific instruction about Buchanan's parole eligibility may have benefited Buchanan, letting the jury speculate that four life sentences plus the years on the firearms offenses would keep him in prison until he was an old man. Moreover, the jury imposed the death penalty based on its finding that the murders were vile, not on a finding that Buchanan was a future danger to society. As parole release is only relevant to the aggravating factor of future dangerousness, it is inconceivable that knowing Buchanan's parole eligibility would have changed the jurors' minds about the vileness of the crime. This claim must be dismissed accordingly.

Claim XIIIC: The trial court refused to permit the jury to hear a preliminary statement proffered by Buchanan's counsel, explaining the *voir dire* process.

Counsel wanted to make a general statement to the venire persons about the *voir dire* process, but the trial court refused their request. This claim does not withstand the respondent's motion. The only real issue with respect

to jury panel questioning is whether the trial judge's *voir dire* was sufficient to impanel an impartial jury. *United States v. Larouche*, 896 F.2d 815, 830 (4th Cir.), *cert. denied*, 496 U.S. 927 (1990). Further, defense counsel were presented with an adequate opportunity to engage the venire persons themselves. At Buchanan's trial both sides were permitted to question the prospective jurors individually, and at length. In addition, there is no constitutional requirement that a trial judge submit any specific form or other statement proffered by the defense counsel to the jury. *See United States v. Bakker*, 925 F.2d 728, 733-34 (4th Cir. 1991). Thus, this claim fails on its merits as well.

Claim XIIID: Commonwealth experts who obtained statements from Buchanan at Central State Hospital failed to advise Buchanan of his constitutional rights.

The Virginia Supreme Court expressly held that this claim was barred from *habeas* review under the procedural default rule of *Slayton*. 205 S.E.2d at 682. Even if Buchanan now contends that his failure to raise the claim at trial or appeal should be excused by cause and prejudice because of counsel's ineffective representation, he did not raise these ineffective assistance allegations to the state courts during *habeas* proceedings. Because the ineffective assistance aspect of the claim is defaulted, *Justus*, 897 F.2d at 713, Buchanan has failed to show cause for his default of this claim, and this court is barred from considering it on the merits. *See Coleman*, 501 U.S. at 750.

XIIIE. Buchanan was denied access to tape recordings made of interviews of Buchanan at Central State Hospital.

The Virginia Supreme Court expressly held that this claim was barred from *habeas* review under the procedural default rule of *Slayton*. 205 S.E.2d at 682. Even if Buchanan now contends that his failure to raise the claim at trial or appeal should be excused by cause and prejudice because of counsel's ineffective representation, he did not raise these ineffective assistance allegations to the state courts during *habeas* proceedings. Because the ineffective assistance aspect of the claim is defaulted, *Justus*, 897 F.2d at 713, Buchanan has failed to show cause for his default of this claim, and this court is barred from considering it on the merits. *See Coleman*, 501 U.S. at 750.

Buchanan has moved for discovery of these tapes. However, inasmuch as the court has found the claim to be barred from federal *habeas* review, the court also finds discovery in conjunction with this claim to be unwarranted. Buchanan's discovery motion must be denied.

V. CONCLUSION

In accordance with the foregoing, it is the opinion of the court that the Commonwealth's motion to dismiss must be granted and that Buchanan's petition for writ of *habeas corpus*, pursuant to 28 U.S.C. §2254, must be denied. After full review of the record and arguments, the court finds petitioner's claims to be either procedurally barred from review by this court or without merit. Because no genuine issues of material fact remain in dispute, the court finds no justification for an evidentiary

hearing. As petitioner is not entitled to relief upon any claim presented, the entire petition must be denied. An appropriate order shall be entered this day.

Petitioner is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with this court within 30 days of the date of entry of this Order, or within such extended period at the court may grant pursuant to Rule 4(a)(5).

The Clerk is directed to send certified copies of this memorandum opinion and accompanying order to petitioner and to counsel of record for respondent.

ENTER: This 25th day of January, 1996.

/s/ James C. Illegible
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DOUGLAS MCARTHUR BUCHANAN, JR.,
Petitioner-Appellant,
v.
RONALD J. ANGELONE, Director, Virginia Department of Corrections; COMMONWEALTH OF VIRGINIA,
Respondents-Appellees.

No. 96-4

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke.
James C. Turk, District Judge.
(CA-93-306-R)

Argued: October 30, 1996

Decided: December 30, 1996

Before HALL and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

OPINION

BUTZNER, Senior Circuit Judge:

In 1988, Douglas McArthur Buchanan, Jr., was convicted of capital murder in Virginia and sentenced to death. After exhausting his state remedies, he petitioned the district court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his petition, he alleged numerous

constitutional defects in the state court proceedings. The district court denied the petition. On appeal, Buchanan presents five issues for review. After careful consideration of his contentions and the record, we find no reversible error and affirm the district court's disposition.

I

On the afternoon of September 15, 1987, Buchanan murdered his father, his stepmother, and his two half brothers. The Virginia Supreme Court's opinion recounts the details of the crime. *Buchanan v. Commonwealth*, 238 Va. 389, 394-96, 384 S.E.2d 757, 760-61 (1989).

Buchanan was charged with capital murder for the killing of "more than one person as part of the same act or transaction." Va. Code Ann. § 18.2-31(7) (Michie 1996). In four separate indictments, the grand jury also charged him with the first degree murder of each victim. In addition, he was charged with four counts of use of a firearm in the commission of a murder.

Buchanan pleaded not guilty to all charges. He was tried before a jury in the Circuit Court for Amherst County, Virginia. The jury found him guilty of capital murder for killing his father, four first degree murders, and the firearm offenses. Following a separate hearing, the jury sentenced Buchanan to death for the capital murder, to life in prison for each of the first degree murders, and to a term of imprisonment for the firearm offenses. The circuit court imposed the recommended sentences.

Buchanan appealed to the Supreme Court of Virginia. The court vacated the redundant conviction of first degree murder for the killing of Buchanan's father and affirmed the other convictions and the related sentences, including the death penalty. *Buchanan*, 238 Va. at 418, 384 S.E.2d at 774. The United States Supreme Court denied certiorari. *Buchanan v. Virginia*, 493 U.S. 1063 (1990).

Buchanan then petitioned for a writ of habeas corpus in the Circuit Court of Amherst County. After the circuit court dismissed his petition, he appealed to the Supreme Court of Virginia, which also denied the petition. The United States Supreme Court again denied certiorari. *Buchanan v. Murray*, 506 U.S. 988 (1992).

Buchanan sought a writ of habeas corpus in federal district court, which denied relief. On appeal, Buchanan now asserts five claims, one relating to the competence of his trial counsel, three alleging errors in his trial, and one challenging the adequacy of the Virginia Supreme Court's appellate review.

II

Buchanan's first claim is that the sentencing jury was inadequately instructed about mitigating evidence. With regard to mitigation, the court told the jury: "[I]f you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment." In addition, the statutory verdict form required the jury to indicate that it had "considered the evidence in mitigation of the offense."

At trial Buchanan asked the court to give a more detailed instruction on mitigation. Specifically, he asked the court to tell the jury that it should consider as mitigating factors his youth, his clean criminal record, and whether he was "under the influence of extreme mental or emotional disturbance" when he committed the crime. Each of these factors is designated as mitigating evidence by Virginia Code § 19.2-264.4 (Michie 1996). During the sentencing hearing Buchanan submitted evidence supporting each factor, and Buchanan's counsel was permitted to discuss the factors in his closing argument.

Buchanan now argues that the trial court's failure to instruct the jury about the specific mitigating factors supported by his evidence violated his constitutional rights in two ways. His first argument rests on the Eighth Amendment. In his view, the trial court's nonspecific instruction did not appropriately channel the jury's discretion so as to avoid an arbitrary or capricious outcome.

The Eighth Amendment requires that a capital sentencing jury's discretion be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Proffitt v. Florida*, 428 U.S. 242, 258 (1976). To accomplish this purpose, a capital sentencing jury must be properly instructed. *Walton v. Arizona*, 497 U.S. 639, 653 (1990). However, the Eighth Amendment does not require states to adopt specific standards for instructing juries on aggravating and mitigating circumstances. *Zant v. Stephens*, 462 U.S. 862, 890 (1983).

Guided by those constitutional principles, this court has previously analyzed and rejected the argument now asserted by Buchanan. In *Clozza v. Murray*, we held that Virginia's death penalty scheme survives constitutional scrutiny, despite its "failure to instruct the jury on statutory mitigating factors." 913 F.2d 1092, 1105 (4th Cir. 1990). In addition, this court has reviewed and approved the constitutionality of jury instructions, used in other Virginia death penalty cases, that were essentially identical to the instructions contested in this case. *Jones v. Murray*, 947 F.2d 1106, 1119-20 (4th Cir. 1991); *Briley v. Bass*, 750 F.2d 1238, 1248-49 (4th Cir. 1984).

In its verdict, the jury, as required by Virginia Code § 19.2-264.4, certified that it had "considered the evidence in mitigation of the offense." In *Jones*, we concluded that "[b]y allowing the jury to consider all relevant mitigating evidence, [Virginia's sentencing] procedure . . . satisfied the requirement of the Eighth and Fourteenth Amendments of individualized sentencing in capital cases." 947 F.2d at 1120. In light of this precedent, Buchanan's Eighth Amendment claim must fail.

Buchanan's second argument asserts a federal due process violation. According to Buchanan, the trial court's nonspecific mitigation instruction was inconsistent with Virginia's death penalty sentencing statute and, as a result, denied him the benefit of the Commonwealth's statutory sentencing scheme. Buchanan argues that this alleged violation of state law infringed his rights under the Due Process Clause.

It is true, at least in the context of discretionary sentencing by a jury, that denial of a state procedural

right may rise to the level of a federal due process violation. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). However, there was no such violation in Buchanan's case because, contrary to his assertion, the trial court's instruction was consistent with the sentencing statute. The statute establishes a capital defendant's right to present mitigating evidence during the sentencing hearing. It neither imposes nor implies an obligation to instruct the jury about specific mitigating factors. Va. Code Ann. § 19.2-264.4.

Our reading of the statute is consistent with the Virginia Supreme Court's interpretation. It is clear from that court's decisions that the statute does not require the trial court to list specific mitigating circumstances. *See, e.g., LeVasseur v. Commonwealth*, 225 Va. 564, 594-95, 304 S.E.2d 644, 661 (1983). Because the jury instructions in this case were consistent with the sentencing statute, Buchanan's due process argument must also fail.

III

The second claim advanced by Buchanan is that the trial court impermissibly limited his ability to present mitigating evidence at the sentencing hearing. This claim is based on the trial court's exclusion of hearsay testimony offered by Buchanan's expert witness, Dr. Robert Brown.

Dr. Brown was Buchanan's principal mitigation witness. In preparation for trial, he performed a psychological evaluation of Buchanan and extensively investigated

his personal and family history. As part of his investigation, he interviewed many of Buchanan's friends and relatives.

Dr. Brown testified at trial that, in his expert opinion, Buchanan was under extreme emotional stress at the time of the killings. He went on to testify extensively about the evidence that supported his conclusion. However, the trial court did not permit him to repeat some of the statements made to him during the interviews he had conducted. Sustaining the prosecution's hearsay objection, the judge excluded all such statements made by individuals who had not appeared at trial. Although the statements were excluded, the judge offered to stay the proceedings and allow the individuals who had made the statements to testify in person. Buchanan declined the offer.

Buchanan insists that application of the hearsay rule in this case violated his constitutional right to present mitigating evidence. As support for his position, he relies on *Green v. Georgia*, 442 U.S. 95 (1979).

Based on the "unique circumstances" present in *Green*, the Court held that Georgia's admittedly proper application of its hearsay rule during the sentencing phase of a death penalty trial violated the Due Process Clause. 442 U.S. at 95-97. In that case, the trial court excluded an out-of-court statement of a man who had already been convicted of capital murder for his role in the killing for which the defendant was being tried. The excluded statement, made spontaneously to a close friend, amounted to an admission that the declarant alone was responsible for the killing. The Court found that

"[t]he excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, [citation omitted], and substantial reasons existed to assume its reliability." *Id.* at 97. Under those circumstances, the Court held that " 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.' " *Id.* at 97 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

The exclusion of the hearsay statements offered by Dr. Brown does not fit within the narrow exception recognized by *Green*. In *Green*, the excluded statement strongly tended to show that the defendant was innocent. In this case, the statements were offered only for the purpose of providing additional support for Dr. Brown's conclusion that Buchanan acted under extreme emotional stress. Even without the proffered statements, Dr. Brown's testimony provided ample evidence to explain his opinion. For this reason, the statements would have had only cumulative probative value. After the trial court offered to continue the case and summon the relatives and friends whom Dr. Brown interviewed, Brown's attorney said: "I don't want to do that Judge. We have enough. I just want to object to your not allowing it in."

The excluded statements also lack the inherent reliability of the statement excluded in *Green*. The statement in *Green* was against the declarant's penal interest, made spontaneously to a close friend, and the state itself had relied on the excluded testimony to convict the declarant of capital murder. At Buchanan's trial, these compelling circumstances do not appear.

The evidence in this case discloses that the application of Virginia's hearsay rule did not rise to the level of a constitutional violation.

IV

Buchanan's third claim is that his trial counsel was ineffective because he failed to take advantage of what Buchanan sees in retrospect as a certain opportunity to have avoided a death sentence. Buchanan contends that, if he had pleaded guilty to the four first degree murder indictments, the constitutional guarantee against double jeopardy would have precluded any further prosecution based on the same killings. This means, he argues, that the Commonwealth could not have prosecuted the capital murder indictments. Because Buchanan's sole objective throughout the criminal proceeding was to avoid the death penalty, he claims that his trial counsel's failure to recognize this opportunity deprived him of his Sixth Amendment right to counsel.

Contrary to Buchanan's assertion, pleading guilty to the first degree murder indictments would not have precluded the Commonwealth from prosecuting the capital charges. The Supreme Court addressed a nearly identical issue in *Ohio v. Johnson*, 467 U.S. 493 (1984). In that case, the defendant pleaded not guilty to the murder and aggravated robbery charges against him and, at the same time, pleaded guilty to the lesser included offenses of involuntary manslaughter and grand theft. The trial court accepted the guilty pleas, sentenced the defendant, and then dismissed the murder and aggravated robbery charges on double jeopardy grounds. *Id.* at 494. On

appeal, the Supreme Court of Ohio affirmed. The Supreme Court of the United States reversed, holding that pleading guilty to the lesser included offenses did not bar the state from prosecuting the greater offenses since all of the charges were brought in a single prosecution. *Id.* at 497-502.

Buchanan asserts that *Johnson* is inapplicable. He points out that in *Johnson* all of the charges were brought in a single indictment. In this case, on the other hand, Buchanan was charged with first degree murder and capital murder in separate indictments.

The distinction drawn by Buchanan would not have made any difference. In *Johnson*, the Court found that permitting the state to pursue the greater charges, even after the defendant pleaded guilty to the lesser charges, did not implicate any of the interests protected by the Double Jeopardy Clause. The Court noted that, by pleading guilty to the lesser included offenses, the defendant "has not been exposed to conviction on the charges to which he pleaded not guilty, nor has the State had the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial." 467 U.S. at 501. The Court concluded that a defendant "should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges." *Id.* at 502. While it is true that *Johnson* involved a single indictment with multiple counts, the Court's reasoning applies equally to a case involving multiple indictments brought in a single prosecution. By itself, the fact that the Commonwealth charged Buchanan in separate indictments

does not constitute the type of "governmental overreaching that double jeopardy is supposed to prevent." *Id.* at 502.

Buchanan argues that, under Virginia law, he had an absolute right to plead guilty at any time to the entirety of any indictment against him. He relies on *Graham v. Commonwealth*, 11 Va. App. 133, 137-40, 397 S.E.2d 270, 273 (1990), but his reliance is misplaced. The Virginia Court of Appeals explained that a plea of guilty to a lesser included offense would not bar prosecution of a greater offense pending in the same prosecution:

> The only discretion given to a court by the statute is the right to refuse a plea of guilty to any lesser offense included in the charge upon which the accused is arraigned. Here the defendant wished to plead guilty to the whole of the indictment, not to a lesser included offense.

Graham, 11 Va. App. at 137, 397 S.E.2d at 272.

Although the explanation in *Graham* is dictum, it was confirmed in a subsequent case. The Virginia Court of Appeals held that pleading guilty to a first degree murder indictment does not preclude the simultaneous prosecution of a capital murder indictment involving the same transaction. *Rea v. Commonwealth*, 14 Va. App. 940, 943-45, 421 S.E.2d 464, 466-68 (1992) (relying on *Ohio v. Johnson*, 467 U.S. 493).

Against this background, it is evident that Buchanan's right to counsel was not violated. The Sixth Amendment right to counsel guarantees effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to establish deprivation of this right,

a criminal defendant must show both that counsel acted incompetently and that counsel's incompetence was prejudicial. *Id.* at 687.

Because there was no reason to believe that pleading guilty to the first degree indictments would have barred prosecution of the capital charges, the failure of Buchanan's counsel to recommend this course of action cannot be labelled incompetent. Additionally, since Buchanan could not have blocked prosecution of the capital charges by pleading guilty to the lesser included offenses, pleading not guilty did not prejudice him. For these reasons, we reject Buchanan's argument that his counsel was ineffective.

V

Next, Buchanan asserts that the Virginia Supreme Court's review of his case was constitutionally inadequate in two respects. First, he alleges that the court failed to consider the mitigating evidence he offered. Second, he claims that the court did not conduct the proportionality review required by Virginia statute in a rational manner. He argues the first deficiency violated both his due process and Eighth Amendment rights, while the second violated his due process rights. According to Buchanan, the federal due process violations arise because the Virginia Supreme Court improperly implemented the pertinent state statute.

The Eighth Amendment requires that the death penalty not be imposed in an arbitrary or capricious manner. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). Meaningful appellate review is an important safeguard against

improper imposition of the death penalty. *Parker v. Dugger*, 498 U.S. 308, 321 (1991). Consistent with those constitutional requirements, Virginia law directs the Commonwealth's highest court to review the record in every death penalty case to determine whether the sentence was "imposed under the influence of passion, prejudice or any other arbitrary factor." Va. Code Ann. § 17-110.1.C.1 (Michie 1996).

The Virginia Supreme Court conducted the mandatory statutory review in this case. The court engaged in an "independent review of the record." By doing so, the court necessarily became aware of the mitigating evidence Buchanan had presented. Nevertheless, the court's examination "reveal[ed] nothing to suggest that the death penalty was imposed . . . as the result of passion, prejudice, or arbitrariness." *Buchanan*, 238 Va. at 418, 384 S.E.2d at 774. On collateral review, federal courts are not required to re-examine a state court's good faith findings. *Cf. Walton*, 497 U.S. at 656. Moreover, the district court conducted its own independent review of the record and, after specifically taking Buchanan's mitigating evidence into account, concluded that the death penalty had not been imposed arbitrarily. For these reasons, Buchanan cannot prevail on this point.

Also without merit is Buchanan's claim that the Virginia Supreme Court's proportionality review was inadequate. Although the Virginia capital sentencing statute requires a proportionality review, Virginia Code § 17-110.1.C.2, the federal Constitution does not. *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984). Buchanan's claims of inadequacy do not provide sufficient constitutional grounds to warrant a writ of habeas corpus. *Peterson v.*

Murray, 904 F.2d 882, 887 (4th Cir. 1990); *Shaw v. Martin*, 733 F.2d 304, 316-17 (4th Cir. 1984).

VI

Buchanan's final contention is that the trial court violated his federal due process rights by refusing to instruct the jury on second degree murder. Among the assignments of error in his appeal to the Supreme Court of Virginia, Buchanan argued that the trial court had erred because it did not give an instruction on second degree murder in compliance with Virginia law. After carefully reviewing the record, the Virginia Supreme Court rejected this argument, concluding that a second degree murder instruction was inappropriate because it lacked evidentiary support. *Buchanan*, 238 Va. at 408-12, 384 S.E.2d at 769-71 (citing Virginia cases). Buchanan, however, did not contend in his direct appeal to the Virginia Supreme Court that the omitted instruction violated federal due process. As a result, the district court properly concluded that Buchanan had not met the exhaustion requirement found in 28 U.S.C. § 2254. Failure to raise a federal claim in state court bars federal review of the omitted claim. *Duncan v. Henry*, 115 S. Ct. 887, 888 (1995); *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

Finding no error, we affirm the judgment denying Buchanan's petition for a writ of habeas corpus.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

(Filed Jan. 27, 1997)

No. 96-4

CA-93-306-R

DOUGLAS MCARTHUR BUCHANAN, JR.

Petitioner-Appellant

v.

RONALD J. ANGELONE, Director, Virginia Department of Corrections; COMMONWEALTH OF VIRGINIA

Respondents-Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

Supreme Court of the United States

No. 96-8400

Douglas McArthur Buchanan, Jr.,

Petitioner

v.

Ronald J. Angelone, Director, Virginia Department of Corrections, et al.

ON PETITION FOR WRIT OF CERTIORARI to the United States Copurt of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

April 28, 1997